CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 544

THE UNITED STATES OF AMERICA

vs.

EDWARD H. MARXEN, TRUSTEE OF MONTEREY BREWING COMPANY, A CORPORATION, BANKRUPT

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED DECEMBER 27, 1938

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1 In United States Circuit Court of Appeals for the Ninth Circuit

IN THE MATTER OF MONTEREY BREWING COMPANY, A CORPORATION, BANKRUPT

No. 8861. Dec. 17, 1938

UNITED STATES OF AMERICA, APPELLANT

vs.

EDWARD H. MARXEN, TRUSTEE OF MONTEREY BREWING COMPANY, A CORPORATION, BANKRUPT, APPELLEE

Certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth Circuit desires instruction for the proper decision of a cause

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

Statement of case

We have pending in this court an appeal by the United States from that portion of an order of the trial court allowing a claim against the bankrupt estate of the Monterey Brewing Company, a corporation, whereby the trial court denied priority to the claim. The claim purports to be one on behalf of the United States of America. It arises out of the acts of the Federal Housing Administrator under the National Housing Act (approved June 27, 1934, 48 Stats. 1246; 12 U. S. C. A. § 1703). The undisputed facts with reference to the claim of priority are as follows:

On January 2, 1936, the California Bank, a banking corporation, loaned $609.39 to the Monterey Brewing Company, for which indebtedness that company executed a promissory note. This indebt-
2 edness was duly reported by the California Bank to the Federal Housing Administrator (hereafter called the Administrator) in pursuance of a policy of insurance issued by the Administrator to the California Bank on August 10, 1934. The California Bank was insured by the said Administrator against losses which it might sustain as result of loans made by it for the purpose of financing alterations, repairs, improvements, and additions on real property, and to purchase and install equipment and machinery on real property.

Upon the report of the loan by the California Bank to the Administrator the insurer, in accordance with the contract of insurance and under the provisions of regulations 15 and 17 adopted by the Federal Housing Administrator, became responsible to the California Bank for the payment of the indebtedness of the Monterey Brewing Company in the event said debtor should fail to pay the same.

Payments were made by the Monterey Brewing Company reducing the amount of the principal indebtedness to $373.33 on February 2, 1937. On that day the debtor defaulted in the payment of its debt. Regulation 15 provides that the insured party may not make claim upon the Administrator until 60 days after such default, which period expired on April 3, 1937.

On April 5, 1937, the Monterey Brewing Company filed its petition and was adjudicated a bankrupt. Thereafter, in accordance with the insurance policy, the California Bank, on July 3, 1937, made a claim upon the Administrator for the payment to it of the balance of indebtedness due the bank by the Monterey Brewing Company. On August 4, 1937, the Administrator, after auditing the claim and finding $384.56 due thereon, paid to the California Bank that sum by draft drawn on the Treasury of the United States, whereupon the California Bank assigned the aforesaid note to the United States of America. On November 18, 1937, the Administrator filed a claim upon said note in said bankrupt estate, purporting to be on behalf of and in the name of the United States of America, and stating the foregoing facts.

On January 18, 1938, the trustee of the bankrupt estate objected to the allowance of the claim as a prior claim of the United States, contending that it should be allowed only as a general claim.

3 On January 27, 1938, the referee in bankruptcy disallowed the claim of the United States as a preferred or prior claim but allowed the same as a general claim, finding as a fact that although in the name of the United States it was in favor of the Administrator.

Upon petition to review, the referee's order was confirmed and approved by the District Court and an appeal to this court followed.

Questions presented

The question before us is whether this claim so presented is entitled to priority under Sec. 64 (b) of the bankruptcy act [11 U. S. C. A. § 104 (b), (7)], giving priority to "debts owing to any person who by the laws of the states or the United States is entitled to priority: provided, that the term 'person' as used in this section shall include corporations, the United States, and the several states and territories of the United States." Priority under this section is claimed by reason of the provisions of Sec. 3466 of the Revised Statutes of the United States (31 U. S. C. A. § 191), which provides that "whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied; and the priority established shall extend * * * to cases in which an act of bankruptcy is committed."

This question, in a slightly different form, has been decided by this court. In Federal Housing Administration v. Moore, 90 F. 2d 32, this court held that a claim upon a note assigned after bankruptcy to the Federal Housing Administrator made by him against a bankrupt estate, based upon a payment of the insured debt after the adjudication of bankruptcy but in pursuance of an insurance obligation en-

tered into by him with the creditor of the bankrupt before bankruptcy, was not entitled to priority for two reasons: first, that the claim was not a claim of the United States and, second, that the Administrator could not acquire priority by the assignment to him of a claim of the bank which had been insured by the Federal Housing Administrator. The trial court in the case at bar held that our decision in Administrator v. Moore, supra, was controlling in the present matter and for that reason denied priority.

After our decision of May 10, 1937, in Administrator v. Moore, supra, the Circuit Court of Appeals for the Eighth Circuit in
4 Wagner v. McDonald, 96 F. 2d. 273, sustained an order allowing the Administrator priority where the claim against the bankrupt was assigned to the Administrator before the bankruptcy of the principal debtor. It referred to our decision in Administrator v. Moore, supra, and distinguished its decision from ours upon the ground that "it does not appear that the claim was filed on behalf of the United States nor that the debt upon which the claim was based was acquired by the administrator acting for the United States." It said: "The court in the Moore case emphasized the fact that the debt was assigned to the administrator after the date of the adjudication."

There is thus a direct conflict between the decision of the Circuit Court of Appeals for the Eighth Circuit (Wagner v. McDonald, supra) sustaining priority in favor of the Administrator, and the decision of this circuit (Administrator v. Moore, supra), denying such priority.

The authorities seem to indicate that under the provisions of Sec. 63 of the Bankruptcy Act (11 U. S. C. A. § 103), the Administrator in the case at bar would have a provable claim even before the payment by him of the obligation of the debtor for which he is responsible. Williams v. U. S. Fidelity, etc., Co., 236 U. S. 549; Cf. In the Matter of the Application of the People of the State of New York, by Jesse S. Phillips, Superintendent of Insurance, appellant, for an order to take possession of the property and liquidate the business of the Casualty Company of America. In the Matter of the claim of the United States of America, respondent, 134 N. E. 571; 232 N. Y. 559. See also, 8 C. J. Sec. p. 1255, § 397.

It would seem to us that if the United States, at the time of bankruptcy, had a provable claim against the estate of the bankrupt by reason of its contract insuring the California Bank the payment of the obligation of the bankrupt to it, to which claim, as an insurer, priority would attach, such priority would not be lost or affected by the fact that subsequent to the adjudication of bankruptcy the Federal Housing Administrator paid the insured bank and accepted an assignment of its claim against the bankrupt and thereafter presented a claim against the bankrupt upon the assigned claim.

In this connection it should be observed that the Bankruptcy Act expressly provides for the subrogation in favor of a surety
5 who pays the debt of the bankrupt for which he is surety. Subdivision (i) of Sec. 57 of the Bankruptcy Act [11 U. S.

C. A. § 93, sub. (i)] provides that "whenever a creditor whose claim against the bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." This section, it will be observed, provides for the filing of the claim by the surety (the United States or the Administrator, as the case may be) in the name of the creditor (the California Bank) and for the subrogation of the surety to the rights of the principal creditor (the California Bank).

The effect of our decision in Administrator v. Moore, supra, is that where the Administrator or, we think, the United States, is subrogated to the rights of a creditor under Sec. 57 (i), 11 U. S. C. A. § 93 (i), it has no right of priority.

The question arises as to whether the provisions of the Bankruptcy Act (§ 64 (b), supra) giving priority to the United States, are modified by the provisions of Sec. 57 (i) giving it the rights of the principal creditor by subrogation. That is to say, does the United States acquire greater rights than the creditor? In considering the controlling effect of the decision of this court in Administrator v. Moore, supra, under the doctrine of stare decisis we are not satisfied that a valid distinction can be drawn between the facts in that case and those in the case at bar, because of the fact that in the present case the Administrator caused the assignment to be made to the United States by name and applied to the court for the allowance of this claim of the United States under and by virtue of his authority as Administrator, whereas in the former case he presented the claim to the bankrupt estate as Administrator claiming to act by and on behalf of the United States. (Sloan Shipyards v. U. S. Fleet Corp., 258 U. S. 549, 570; Clallam Co. v. U. S., 263 U. S. 341.)

Because of the conflict between our prior decision in Administrator v. Moore, supra, and the decision of the Circuit Court of Appeals for the Eighth Circuit in Wagner v. McDonald, supra; and because
6 of our doubt as to the correctness of our decision, which was not rendered by the same three Circuit Judges to whom the present case is submitted; and because of the doubtful propriety of one group of Circuit Judges in a given circuit modifying or overruling a decision by other Circuit Judges in such circuit; and because of the importance of the question, we submit to the Supreme Court of the United States, as provided in 28 U. S. C. A. § 346, for binding instructions, the following question:

Question certified

Where, prior to the filing of a petition for and adjudication in bankruptcy of the maker of a promissory note payable to a bank, the Federal Housing Administrator, under the provisions of the National Housing Act, insured the payee bank against the nonpayment of the note by its maker, upon which note the maker became in default more

than sixty days prior to said filing and adjudication, and upon demand of the insured bank made after the adjudication, the Federal Housing Administrator paid to the bank its claim arising from such default, and procured an assignment to the United States of the claim of the insured bank against the bankrupt, which claim had not been presented or proved in bankruptcy by the insured bank, and presented such claim in the name of the United States to the trustee in bankruptcy having before him other allowed claims against the bankrupt, is such claim entitled to priority over such other claims under sec. 3466 of the Revised Statutes (31 U. S. C. A. § 191) by reason of the provisions of sec. 64 (b) (7) [11 U. S. C. A. § 104 (b) (7)].

CURTIS D. WILBUR,
Circuit Judge.
WILLIAM DENMAN,
Circuit Judge.
WILLIAM HEALY,
Circuit Judge.

[Endorsed:] Certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth Circuit desi[illegible] instruction for the proper decision of a cause. Filed Dec. 17, 19[illegible] Paul P. O'Brien, Clerk.

A true copy,
Attest, December 20, 1938.

[SEAL] PAUL P. O'BRIEN, *Clerk.*

Certificate. Enter: Attorney General. File No. 43,029. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 544. The United States of America vs. Edward H. Marxen, Trustee of Monterey Brewing Company, a corporation, Bankrupt. Filed December 27, 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1939

No. 544

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA

v.

EDWARD H. MARXEN, TRUSTEE OF MONTEREY BREWING COMPANY, A CORPORATION, BANKRUPT

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court for the Southern District of California is reported in 24 F. Supp. 463. The United States Circuit Court of Appeals for the Ninth Circuit rendered no opinion.

JURISDICTION

The certificate of the United States Circuit Court of Appeals for the Ninth Circuit was filed December 27, 1938. The jurisdiction of this Court rests on Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question certified reads as follows (C. 4–5) [1]:

> Where, prior to the filing of a petition for and adjudication in bankruptcy of the maker of a promissory note payable to a bank, the Federal Housing Administrator, under the provisions of the National Housing Act, insured the payee bank against the nonpayment of the note by its maker, upon which note the maker became in default more than sixty days prior to said filing and adjudication, and upon demand of the insured bank made after the adjudication, the Federal Housing Administrator paid to the bank its claim arising from such default, and procured an assignment to the United States of the claim of the insured bank against the bankrupt, which claim had not been presented or proved in bankruptcy by the insured bank, and presented such claim in the name of the United States to the trustee in bankruptcy having before him other allowed claims against the bankrupt, is such claim entitled to priority over such other claims under sec. 3466 of the Revised Statutes (31 U. S. C. A. § 191) by reason of the provisions of sec. 64 (b) (7) [11 U. S. C. A. § 104 (b) (7)].

The question certified may be considered as presenting the following questions:

1. Whether the claim filed in the bankruptcy proceeding is a claim of the United States.

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[1] These references are to the Certificate.

2. Whether the Government's claim was provable in bankruptcy where the bankrupt defaulted more than sixty days before the petition in bankruptcy was filed and, after bankruptcy, the Government discharged its obligation to the payee of the bankrupt's note and obtained an assignment of the note.

3. Whether the Government's claim is entitled to priority under Section 64b (7) of the Bankruptcy Act, as amended, and Revised Statutes, Section 3466.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra* pp. 29–34.

STATEMENT

The facts as summarized from the Certificate (pp. 1–2) are as follows (C. 1–2):

On January 2, 1936, the California Bank, a banking corporation, loaned $609.39 to the Monterey Brewing Company, for which indebtedness that company executed a promissory note. That indebtedness was duly reported by the California Bank to the Federal Housing Administrator (hereinafter called the Administrator) in pursuance of a policy of insurance issued by the Administrator to the California Bank on August 10, 1934. The California Bank was insured by the Administrator against losses which it might sustain as a result of loans made by it for the purpose of financing alter-

ations, repairs, improvements and additions on real property, and to purchase and install equipment and machinery on real property.

Upon the report of the loan by the California Bank to the Administrator, he became responsible to the California Bank for the payment of the indebtedness of the Monterey Brewing Company, in accordance with the contract of insurance and under the provisions of Regulations 15 and 17 adopted by the Administrator, in the event said debtor should fail to pay the same.

Payments were made by the Monterey Brewing Company reducing the amount of the principal indebtedness to $373.33 on February 2, 1937. On that day the debtor defaulted in the payment of its debt. Regulation 15 provides that the insured party may not make claim upon the Administrator until sixty days after such default, which period expired on April 3, 1937.

On April 5, 1937, the Monterey Brewing Company filed its petition and was adjudicated a bankrupt. Thereafter, in accordance with the insurance policy, the California Bank, on July 3, 1937, made a claim upon the Administrator for the payment to it of the balance of indebtedness due the bank by the Monterey Brewing Company. On August 4, 1937, the Administrator, after auditing the claim and finding $384.56 due thereon, paid to the California Bank that sum by draft drawn on the Treasury of the United States, whereupon the

California Bank assigned the note to the United States. On November 13, 1937, the Administrator filed a claim upon the note in the bankruptcy proceedings on behalf of and in the name of the United States.

On January 18, 1938, the trustee of the bankrupt estate objected to the allowance of the claim as a prior claim of the United States, contending that it should be allowed only as a general claim. On January 27, 1938, the referee in bankruptcy disallowed the claim of the United States as a prior claim but allowed the same as a general claim, finding as a fact that although in the name of the United States it was in favor of the Administrator.

Upon petition to review the referee's order was confirmed and approved by the District Court. An appeal was then taken to the Circuit Court of Appeals for the Ninth Circuit which has certified the question of priority.

SUMMARY OF ARGUMENT

I. The Federal Housing Administrator is an official of the United States Government. The Federal Housing Administration is an agency of the United States and is not incorporated. The United States is the real party in interest and the claim is a claim of the United States and not one of the Federal Housing Administrator.

II. The claim of the United States was not based on the assignment of the bankrupt's note after

bankruptcy. An implied contract existed between the Brewing Company as maker of the note and the United States as insurer or surety at the time of the filing of the petition in bankruptcy. The United States had a provable claim in bankruptcy at the time the petition was filed notwithstanding the fact that it had not at that time reimbursed the Bank for the unpaid balance of the note.

III. The United States, having a provable debt at the time of the filing of the petition in bankruptcy, was entitled to priority within the terms of Section 3466 of the Revised Statutes, which have been liberally construed in favor of the United States, and within its purpose and policy to grant priority to all debts, legal and equitable, due to the United States from any person, individual or corporate.

ARGUMENT

On February 2, 1937, the maker defaulted on the unpaid balance of its promissory note given to the California Bank as payee, payment of which had been insured by the Administrator on behalf of the United States pursuant to the National Housing Act. On April 5, 1937, the maker filed its petition and was adjudicated bankrupt. On July 3, 1937, the Bank made a claim upon the Administrator for payment of the balance of the note and, upon payment, assigned the note to the United States. On November 13, 1937, the Administrator filed a claim on behalf of and in the name of the United States, claiming priority in the bankruptcy proceedings.

This question of priority of claims by the Administrator on behalf of the United States has been decided in favor of the Government in some cases. *Wagner* v. *MacDonald*, 96 F. (2d) 273 (C. C. A. 8th); *In re Dickson's Estate*, 84 P. (2d) 661 (Sup. Ct. Wash.); *In re Stamford Auto Supply Co.*, 25 F. Supp. 530 (N. D. Tex.); *In re T. N. Wilson, Inc.*, 24 F. Supp. 651 (E. D. N. Y.); *In re Dowell-Willis Chevrolet Co.*, 23 F. Supp. 236 (N. D. Tex.). Other cases have been decided against the Government either on the ground that the claim of the Administrator is not a claim of the United States (*Federal Housing Administrator* v. *Moore*, 90 F. (2d) 32 (C. C. A. 9th)), or on the ground that, even if it is a claim of the United States, there is no priority if the United States obtained an assignment of the bankrupt's note after bankruptcy, because the Government can obtain no better claim than its assignor. *In re Hansen Bakeries, Inc.*, decided January 27, 1939 (C. C. A. 3rd) not yet officially reported but see C. C. H. Bankruptcy, Par. 51590, Prentice-Hall Bankruptcy, p. 8103; *In re Miller*, 25 F. Supp. 336 (S. D. N. Y., now pending on appeal in the Second Circuit Court of Appeals awaiting decision in the instant case).

In the present case the referee denied priority apparently on the first ground (C. 2) and the District Court affirmed (24 F. Supp. 463) on the authority of *Federal Housing Administrator* v. *Moore, supra*.

The trustee contended in his brief in the court below that the debt, due to the Bank alone at the time of the bankruptcy adjudication, did not obtain the status of a prior claim by assignment to the United States after bankruptcy. In his reply brief the trustee contended that the United States was not a surety or guarantor of the bankrupt with a provable claim, but was an insurer with no claim provable in bankruptcy. The Government contended below and now contends (I) that the claim is a debt due to the United States; (II) that the United States had a provable claim at the time the petition in bankruptcy was filed; and (III) that the claim of the United States is a prior claim.

I

THE UNITED STATES IS THE REAL PARTY IN INTEREST AND THE CLAIM IS A CLAIM OF THE UNITED STATES AND NOT OF THE FEDERAL HOUSING ADMINISTRATOR

By Title I of the National Housing Act of June 27, 1934, c. 847, 48 Stat. 1246, Congress authorized the President to create a Federal Housing Administration. Section 1 provides that all of the powers of the Administration are to be exercised by a Federal Housing Administrator appointed by the President by and with the advice and consent of the Senate.[2] Section 2 (as amended by Section 28 of

[2] On June 30, 1934, the President created the Administration and appointed the Administrator (See Executive Order No. 7280, promulgated January 28, 1936, *infra*, p. 41).

the Act of May 28, 1935, c. 150, 49 Stat. 293, 299, and by Section 344 (b), the Banking Act of August 23, 1935, c. 614, 49 Stat. 684, 722) authorized and empowered the Administrator to insure financial institutions approved by him against losses which they might sustain as a result of certain types of loans and advances of credit made by them for the purpose of financing alterations, repairs, and improvements upon real property, including the purchase and installation of equipment and machinery. Section 3 (repealed by Section 2 of the Act of April 3, 1936, c. 165, 49 Stat. 1187, 1188) authorized the Administrator to enter into loan agreements with such financial institutions.

Section 4 provided that the funds to carry out the provisions of Titles I, II, and III of the Act were to be obtained from the Reconstruction Finance Corporation, and, at the President's discretion, from any funds available to the President for emergency purposes. Section 202 of Title II of the Act provided for the immediate allocation of $10,000,000 out of these funds to a Mutual Mortgage Insurance Fund to be used by the Administrator as a revolving fund for the purposes of Title II, mutual mortgage insurance. Section 206 provided that moneys in this fund not needed for current operations shall be deposited in the Treasury of the United States to the credit of the Mutual Mortgage Insurance Fund or invested in obligations of the United States.

Section 344 (a) of the Banking Act of August 23, 1935, c. 614, 49 Stat. 684, 722, amended Section 1 of the National Housing Act to provide that the Administrator shall, in carrying out the provisions of Titles I, II, and III, be authorized, in his official capacity, to sue and be sued. Section 1 of the Act of April 3, 1936, c. 165, 49 Stat. 1187, 1188, amended Section 2 of the National Housing Act to provide that the Administrator shall have the power, under regulations prescribed by him and approved by the Secretary of the Treasury, to assign, sell, collect, or compromise all obligations assigned to or held by him in connection with the payment of the insurance until such obligations are referred to the Attorney General for suit or collection.

Section 3 of the Act of April 17, 1936, c. 234, 49 Stat. 1232, 1233, added Section 6 to the National Housing Act, authorizing the Administrator to insure banks and other financial institutions approved by him against losses on loans made until January 1, 1937, or such earlier date as the President might proclaim upon the determination that the emergency no longer existed for the purpose of financing owner or lessees of real property in replacing improvements damaged by floods or other catastrophes in 1935 or 1936.

The Federal Housing Administration was created as an agency of the United States, with funds supplied wholly by the Government either directly

or by the Reconstruction Finance Corporation, as an integral part of the broad plan adopted to remedy the urban home mortgage crisis.[3]

The house renovation and modernization plan under Title I was devised to assist in reopening the normal channels of credit and in bringing about a revival of repair work and new building after several years of lessened activity which had reduced employment in the building trades and allied industries.[4]

The fact that the Administrator exercised his powers solely as an officer of the Government is made clear by the statutory provisions subjecting him in some respects to the supervision of other officers of the Government. Insurance under the Act of April 17, 1936, could be contracted for only up to January 1, 1937, or an earlier date fixed by the President. Claims could be compromised only under regulations approved by the Secretary of the Treasury and only until such claims were referred to the Attorney General for suit or collection.

All expenses of the Administration including claims paid under Title I are paid by voucher approved by the Administrator and preaudited by the General Accounting Office. Collections by the Administrator upon notes and collateral assigned to

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[3] See Respondent's brief, p. 71, *Kay* v. *United States*, No. 61, October Term, 1937.

[4] See First Annual Report of the Federal Housing Administration, p. 3, submitted to Congress pursuant to Section 5 of the National Housing Act.

the Administration resulting from insured losses are covered into the Treasury as miscellaneous receipts. Thus the Administrator does not have physical possession of any moneys. Expenditures are made by the disbursing officer of the Treasury under the authority of the Administrator, and the funds received by the Administrator are turned over to the Treasury.[5]

The acts of agents and instrumentalities of the United States Government have often been held to be those of the United States in legal effect when the United States was the real party in interest.[6]

In the present case the Administrator expressly held himself as acting and was acting "on behalf of and in the name of the United States * * *" (C. 2). The bankrupt's note was assigned to the United States (C. 2) pursuant to instructions issued to all insured financial institutions (circular letter of the Administration, *infra*, p. 36). The contract of insurance issued to the California bank expressly states that the Administrator, "acting for and on behalf of the United States," has approved the financial institution and the contract is executed by the Administrator "for and on be-

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[5] See Letter of Comptroller General to Administrator dated January 23, 1936, *infra*, p. 42.

[6] *E. I. Du Pont De Nemours & Co.* v. *Davis*, 264 U. S. 456, 462; *Clallam County* v. *United States*, 263 U. S. 341; *U. S. Grain Corp.* v. *Phillips*, 261 U. S. 106; *Posey* v. *Tennessee Valley Authority*, 93 F. (2d) 726, 727 (C. C. A. 5th); *Langer* v. *United States*, 76 F. (2d) 817, 823 (C. C. A. 8th); *North Dakota-Montana Wheat Growers' Ass'n* v. *United States*, 66 F. (2d) 573, 576-577 (C. C. A. 8th).

half of the United States" and is signed by the "United States of America," being executed for the Government by the Administrator.[7]

The provision authorizing the Administrator to sue and be sued merely provides another officer in whose name the rights of the United States, the real party in interest, can be asserted and defended.[8]

The respondent submits that it has been correctly held that the claim is a claim of the United States. *Wagner* v. *McDonald,* 96 F. (2d) 273, 274 (C. C. A. 8th); *In re Dickson's Estate,* 84 F. (2d) 661, 664 (Sup. Ct. Wash.); *In re Dowell-Willis Chevrolet Co.,* 23 F. Supp. 236, 240 (N. D. Tex.), *In re T. N. Wilson, Inc.,* 24 F. Supp. 651 (E. D. N. Y.).

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[7] This contract of insurance, dated August 10, 1934 (Appendix, *infra*, p. 36), is not set out in the Certificate but is on an official form identical with the official form annexed to the regulations dated July 15, 1935, issued by the Administrator pursuant to the National Housing Act and in effect when the loan here involved was made on January 2, 1936.

[8] *United States Shipping Board Emergency Fleet Corp.* v. *Wood*, 258 U. S. 549, 570, held that a claim of the Fleet Corporation was not entitled to priority under Revised Statutes, Section 3466. That case is distinguishable, however, because the Fleet Corporation was not merely empowered to sue and be sued, but also was created, like any business corporation, as a distinct corporate entity under the General Laws of the District of Columbia and because the claim was not in the name of the United States. Compare *Whan* v. *Green Star S. S. Corporation*, 22 F. (2d) 483, 487–488 (C. C. A. 2d), certiorari denied, 276 U. S. 629, in which the claim arising out of transactions involving the Fleet Corporation was in the name of the United States and was allowed priority.

II

THE GOVERNMENT POSSESSED A PROVABLE CLAIM AT THE TIME THE PETITION IN BANKRUPTCY WAS FILED

Some of the decisions denying priority to the Government's claims as insurer seem to be based (although the opinions do not discuss the question at any length) first on the legal ground that a claim, arising out of a transaction to which the United States was not a party before bankruptcy, does not become entitled to priority under Revised Statutes, Section 3466, simply by assignment to the United States after bankruptcy and then upon the assumption that the claim of the United States as an insurer should be treated as a claim purchased after bankruptcy. *In re Hansen Bakeries, Inc., supra; In re Miller, supra.* Even assuming *arguendo* that Section 3466, despite its broad language, was not intended to extend priority to a claim arising out of a transaction before bankruptcy to which the United States was not a party and assigned to the United States after bankruptcy (but see Point III *post*), the Government submits that the courts erred in these decisions in assuming that the claim as insurer is based solely on the promissory note and is to be treated in the same manner as a claim purchased after bankruptcy.

The Government as insurer has an indemnitor's rights, and, like a surety, is subrogated to the rights of the assured. *Aetna Life Ins. Co.* v. *Moses,* 287

U. S. 530, 542. The Bankruptcy Act contains specific provisions regulating the obligations and rights of sureties, guarantors, or other persons, such as the United States as insurer here, secondarily liable for a bankrupt's debts. Section 16 provides that the liability of codebtors or sureties shall not be altered by the discharge of the bankrupt. Section 57i provides that the surety may prove the principal creditor's claim in the creditor's name if the latter fails to do so.

The relationship between the surety and the bankrupt is based not only upon the surety's subrogation to the principal creditor's rights but also on the separate, though ancillary, implied contract between the bankrupt and the surety. The surety has a claim which is not objectionably contingent, but is provable in bankruptcy even though the surety does not pay the debt until after bankruptcy. *Williams* v. *United States Fidelity Co.*, 236 U. S. 549; cf. *Maynard* v. *Elliott*, 283 U. S. 273.

On the one hand the surety might be considered to be proving the claim, separate from the creditor's claim, based on the bankrupt's promise to the surety, implied in the present case but often expressed and sometimes secured by collateral. *Tennant v. United States Fidelity & Guaranty Co.*, 17 F. (2d) 38 (C. C. A. 3rd); cf. *Williams* v. *United States Fidelity Co., supra.* On the other hand, the surety might be considered to be proving the principal creditor's claim. *J. S. Farming Co.* v. *Bran-*

nan, 263 Fed. 891 (C. C. A. 6th); *Swarts* v. *Siegel*, 117 Fed. 13 (C. C. A. 8th); *In re Astoroga Paper Co.*, 234 Fed. 792, 796 (N. D. N. Y.); *In re Manhattan Brush Mfg. Co.*, 209 Fed. 997 (S. D. N. Y.). A distinction between the principal creditor's claim on a promissory note, which may be proved by the surety, and the surety's claim based on the bankrupt's implied promise is indicated to some extent by the consideration that the former claim is provable as a debt evidenced "by an instrument in writing" under Section 63a (1), but the latter claim, like the surety's claim in the *Williams* case, *supra*, is provable as a debt on a "contract expressed or implied" under Section 63a (4).

For most purposes a sharp distinction is not made to determine upon which promise the surety proves its claim (*Williams* v. *United States Fidelity Co.*, *supra*) because in either case the surety's rights are the same and double recovery by a claim on both promises is not permitted. Cf. *In re Oriental Commercial Bank*, L. R. 7 Ch. App. 99, 103. In the present case, however, the existence of the implied contract between the Government as insurer and the bankrupt, from the time the bankrupt signed the note, serves to distinguish the claim of the United States as a surety from a claim which the United States might purchase after bankruptcy. Even if such a purchased claim were denied priority, which is not conceded, the present claim of the United States as insurer is different because it arises before bankruptcy.

The implied contract in the present case existed between the bankrupt and the United States from the time the note was executed. On July 15, 1935, the Federal Housing Administrator approved a printed form (No. FHE 3–CS, Appendix, *infra*, p. 38) to be filled out by applicants for loans of less than $2,000 under Title I of the National Housing Act. Regulation 10, approved July 15, 1935, *infra*, p. 34), required the borrower to fill out that form before an insured loan could be made. On that form the applicant for such a loan states that he is submitting information concerning his credit standing "for the purpose of inducing you [the insured financial institution] to grant credit under the provisions of Title I of the National Housing Act." Later on in the same printed form the applicant is asked whether he has ever theretofore applied for or received a loan or loans under the National Housing Act. A person filling out such an application is thus made aware that he is seeking a loan in respect of which the financial institution is insured under the Act; and if such a loan is granted, that surety rights and obligations on the part of the United States will accrue for which he will be responsible in case of a default on his part, bringing the suretyship relation into operation.

The consideration to the Government in acting as surety for the bankrupt was its agreement to use the money received to effectuate the purposes

of the National Housing Act. The California Bank agreed to advance the money because the Administrator had agreed to pay the bankrupt's obligation if it should default. It may fairly be assumed that the Bank would never have made this loan if payment thereof had not been assured. The consideration between the bank and the Government was the granting of this loan for which the Government was acting as surety or insurer in order that the purposes of the National Housing Act would be accomplished. The borrower derived benefit from the proceeds of the loan and the bank made a profit. Thus when the note was executed and the loan granted, the relation of suretyship was created between the Monterey Brewing Company, the California Bank, and the United States.

The Government rights as insurer or surety were based on the implied promise of the bankrupt and on the doctrine of subrogation but not on the assignment of the note. The Government had a provable claim at the time of bankruptcy independent of and before the assignment of the note. It is submitted, therefore, that whether the provable claim is based on the promise to the Bank or the implied promise to the surety, the question to be determined is the priority of a claim held by the Government at the time of bankruptcy and not the priority of a claim, arising out of a transaction to which the Government was not a party, assigned to the Government after bankruptcy.

III

THE CLAIM OF THE UNITED STATES IS ENTITLED TO PRIORITY UNDER SECTION 64 (b) (7) OF THE BANKRUPTCY ACT AND REVISED STATUTES, SECTION 3466

Section 64 (b)[9] (7) of the Bankruptcy Act, as amended by the Act of May 27, 1926, c. 406, 44 Stat. 662, 666–667, provides that "debts owing to any person who by the laws of the States or the United States is entitled to priority" shall be paid in advance of dividends to general creditors, provided that the term person, as used therein, shall include the United States.

Revised Statutes, Section 3466, is a law of the United States, within the meaning of Section 64 (b) (7) of the Bankruptcy Act, entitling debts of the United States to priority. *United States* v. *Kaplan*, 74 F. (2d) 664, 665 (C. C. A. 2d). The Government contends that the debt due from the bankrupt to the United States, arising out of its insurance of the bankrupt's promissory note, is a debt entitled to priority within the words of Section 3466, which have been given the full effect of their natural and common meaning by judicial construction since at least 1805. *United States* v. *Fisher*, 2 Cranch 358.

1. *The terms of Section 3466 include this debt.*—In broadest possible language Section 3466 pro-

[9] The Act of 1926 added the proviso after it was determined in *Davis* v. *Pringle*, 268 U. S. 315, that the United States was not a person within this section before the amendment.

vides that "Whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied; * * *." The statute does not exclude from its operation any class of debtors of the United States or any class of debts due to the United States, but includes all debts due to the United States from any person.

The statute says "Whenever any person indebted to the United States *is* insolvent," not *becomes* insolvent, and, therefore, this language may be broad enough to include even a debt arising out of a transaction to which the United States was in no manner a party and assigned to the United States after the debtor's insolvency. Compare United *States* v. *Bank of North Carolina*, 6 Pet. 29, and *United States* v. *Bryan*, 9 Cranch 374. In the present case, however, it is unnecessary to decide that question because the United States is not asserting such a debt but is asserting a claim it had before bankruptcy and sufficiently definite when the petition in bankruptcy was filed to be a provable claim at that time whether viewed as a claim based on the distinct, although ancillary, implied promise of the bankrupt to the United States as insurer, or viewed as a claim, by subrogation, based on the bankrupt's promise to the California Bank (Point II, *supra*). It must also be noted that the default on the note occurred before bankruptcy.

If the debt to the United States is based on the implied promise of the bankrupt to which the bank was not directly a party, certainly the debt is within the terms of Section 3466. Even if the claim of the United States, by subrogation, is based on the promise to the Bank, we submit that it is a debt due to the United States within the commonly understood meaning of the words of Section 3466.

2. *Judicial construction of Section 3466 supports our contention.*—The Act of July 31, 1789, Sec. 21, c. 5, 1 Stat. 29, 42, first gave the United States priority but was limited to debts due on bonds for duties. The Act of May 2, 1792, Sec. 18, c. 27, 1 Stat. 259, 263, allowed sureties who paid their debts to the United States to exercise their priority. The Act of March 3, 1797, Sec. 5, c. 20, 1 Stat. 512, 515, extended the priority to all debts due from any person. The Act of March 2, 1799, Sec. 65, c. 22, 1 Stat. 627, 676, applied to bonds for duties. R. S., Sec. 3466 is derived from the Acts of 1797 and 1799.

From the beginning Section 3466 and its statutory predecessors have been construed liberally in favor of the United States to include all debts of any kind due to the United States from any person, individual or corporate. *United States* v. *Fisher*, 2 Cranch 358; *Harrison* v. *Sterry*, 5 Cranch 289, 298–299; *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 35; *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 134; *Lewis, Trustee* v. *United States*,

92 U. S. 618–621; *Bramwell* v. *United States Fidelity and Guaranty Co.*, 269 U. S. 483, 487; *Price* v. *United States*, 269 U. S. 492, 500; *Howe* v. *Sheppard*, 2 Sumner 133, 12 Fed. Cas. No. 6772, p. 672 (C. C. Me.).

United States v. *Fisher, supra*, construed Section 5 of the Act of 1797. The cashier of the Bank of the United States, for the Secretary of the Treasury, purchased a bill of exchange endorsed by one Blight and paid for it by a warrant on the Bank. The bill was protested after notice given on April 11, 1800. Blight committed an act of bankruptcy and a commission issued against him on April 10, 1801. Thereafter an absolute assignment of his effects was made and the United States brought an action against the assigned to recover the amount of the protested bill and damages. The court below upon these facts, which are stated in its opinion, held that priority was restricted to debts due from revenue officers or other persons accountable for public money. *United States* v. *Fisher*, 1 Wash. C. C. 4.

On appeal it was argued that Section 5 should be construed in relation to the title and the other sections of the Act of 1797 limited to receivers of public money, and that the phrase "any other person" in Section 5 should be read to mean "any other person accountable for public money." It was also argued that commercial embarrassment would be caused by a broader construction because credi-

tors, although anticipating the priority of the Government's claims against receivers of public money, expect to share equally with all the creditors upon the insolvency of a private debtor who may have endorsed a bill of exchange purchased by the Government. The Court held, however, that the words of Section 5, which have been carried into Section 3466, were too broad to be limited by the fact that the title of the Act and the other sections were restricted to public officers. The argument of inconvenience was rejected as one which should be directed to Congress in view of the plain words of the statute and the decision of the court below was reversed. Justice Washington, who wrote the opinion of the court below, took no part in the decision on appeal but filed an opinion (pp. 397–405) repeating his views.

In *Harrison* v. *Sterry, supra,* this Court rejected the construction that the priority was not intended to apply to a debt arising upon a contract made by the United States abroad. In *United States* v. *Bank of North Carolina, supra,* this Court held that the priority was not limited to a debt on a customer's bond due when the assignment in insolvency was made, but extended to the debt due on a bond not payable at that time.

This Court in *Beaston* v. *Farmer Bank, supra,* holding that a corporation which was a debtor of the United States was a person within Section 5

of the Act of 1797, summed up the rule established by the earlier opinions as follows (p. 134):

> All debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language used in the fifth section of the act of congress. And it is manifest, that congress intended to give priority of payment to the United States over all other creditors, in the cases stated therein. It, therefore, lies upon those who claim exemption from the operation of the statute, to show that they are not within its provisions * * *. As this statute has reference to the public good, it ought to be liberally construed * * *.

In *Lewis, Trustee* v. *United States, supra,* holding that the United States as a creditor of a partnership is entitled to prior payment out of the bankrupt partners' separate estates, this Court stated (p. 621):

> It [the debt] may be by simple contract, specialty, judgment, decree, or otherwise by record. The debt may be legal or equitable, and have been incurred in this country or abroad. A valid indebtedness is as effectual in one form as another. No discrimination is made by the statute.
>
> The debtors may be joint or several, and principals or sureties.

In *Howe* v. *Sheppard, supra,* priority was granted even to a debt assigned to the United

States. Judgment creditors, in partial satisfaction of indebtedness on duty bonds, assigned to the United States a judgment arising out of a transaction to which apparently the United States was not a party. Pending the action by the United States on the judgment in the name of the judgment creditors, the judgment debtor died and his estate was found to be insolvent. The administrator of the estate contended that there was no priority on the ground that the assignment did not make the judgment debtor a debtor of the United States or give the assignee new rights but that the assignee "stands only in the place of the assignor" not altering the debtor's liability. The court (Story, J.) held, however, that the assignment did in equity transfer the debt to the United States and that the statute made no distinction between legal and equitable debts. The court stated (12 Fed. Cas. p. 675):

> The words of the statute seem to extend to all cases of debts due to the United States from an insolvent debtor's estate; and if payable at all out of his assets, the rule of priority seems co-extensive with the duty of the executor or administrator to pay.

The more recent cases also emphasize that the "established rule of liberal construction requires that the priority act be applied having regard to the public good it was intended to advance. Its

application is not to be narrowly restricted to the cases within the literal and technical meaning of the words used." *Bramwell* v. *U. S. Fidelity Co.*, 269 U. S. 483, 492; *Price* v. *United States*, 269 U. S. 492, 500.

Cases such as *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, 485–486, and *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236, 240, are distinguishable because they "dealt with legislation of a different character." *United States* v. *Knott*, 298 U. S. 544, 547–548. In those cases claims arising out of Federal control and the termination of Federal control of the railroads were denied priority on the ground that Congress unmistakably disclosed its purpose that such claims should not obtain priority under Section 3466. In the *Guaranty Trust* case this Court pointed out (p. 485) that the priority would defeat the purpose of Congress to re-establish railroad credit and that by statutory provisions for security Congress disclosed a purpose not to rely on the statutory priority.

In the present case, however, the statute does not require security on loans of the type here involved. The existence of the priority facilitates loans and thus helps to achieve the objectives of the statute because it protects the United States without strict requirements in the Administrator's regulations for security or other limitations on loans.

The court below in its Certificate (C. 4) states that the question arises whether the provisions of Section 64 (b) giving priority to the United States are modified by Section 57i, which provides that whenever a creditor fails to prove a claim the surety may do so in the creditor's name. Nothing in the purpose of Section 57i or in the relation of these sections or elsewhere in the Act suggests that the priority granted in Section 64 (h) (7) shall be limited by Section 57i. The purpose of Section 57i is to protect the interest of sureties in the bankruptcy assets, not to limit priority or other rights which a surety may have. Moreover, Section 57i applies to sureties generally and does not mention the United States. The canon of construction that the rights of the United States are not affected by general words of a statute applies to the Bankruptcy Act and forbids limitation of its priority by such a construction of the general terms of Section 57i.

It is submitted that the debt of the United States is entitled to priority because it is within both the terms of Section 3466 and its purpose and public policy that upon a debtor's insolvency the debt due to all the people, represented by the Government, shall be paid before the debts due to other creditors.

CONCLUSION

The question certified should be answered in the affirmative.

Respectfully submitted.

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MARCH 1939.

APPENDIX

Section 3466 of the Revised Statutes (U. S. C., Title 31, sec. 191) provides as follows:

> SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The Act of July 1, 1898, Section 57 i, c. 541, 30 Stat. 544, 560 (U. S. C., Title 11, sec. 93), provides:

> i. Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditors.

The Act of May 27, 1926, Section 15, c. 406, 44 Stat. 662, 666–667 (U. S. C., Title 11, sec. 104),

provides, in part, that Section 64, subdivision (b) of the Bankruptcy Act of July 1, 1898, and Acts amendatory thereof and supplementary thereto, is amended as follows:

SEC. 15 (b). The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary and involuntary cases, as the court may allow; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses of such creditors in opposing such composition; (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of the

proceeding, not to exceed $600 to each claimant; (6) taxes payable under paragraph (a) hereof and (7) debts owing to any person who by the laws of the States or the United States is entitled to priority: *Provided*, that the term "person" as used in this section shall include corporations, the United States, and the several States and Territories of the United States.

Title I of the Act of June 27, 1934, c. 847, 48 Stat. 1246–1247 (U. S. C., Title 12, secs. 107–1706) provides:

TITLE I—HOUSING RENOVATION AND MODERNIZATION

CREATION OF FEDERAL HOUSING ADMINISTRATION

SECTION 1. The President is authorized to create a Federal Housing Administration, all of the powers of which shall be exercised by a Federal Housing Administrator (hereinafter referred to as the "Administrator"), who shall be appointed by the President, by and with the advice and consent of the Senate, shall hold office for a term of four years, and shall receive compensation at the rate of $10,000 per annum. In order to carry out the provisions of this title and titles II and III, the Administrator may establish such agencies, accept and utilize such voluntary and uncompensated services, utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, and appoint such other officers and employees as he may find necessary, and may prescribe their authorities, duties, responsibilities, and tenure and fix their compensation, without regard to the

provisions of other laws applicable to the employment or compensation of officers or employees of the United States. The Administrator may delegate any of the functions and powers conferred upon him under this title and titles II and III to such officers, agents, and employees as he may designate or appoint, and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for lawbooks and books of reference, and for paper, printing, and binding) as are necessary to carry out the provisions of this title and titles II and III, without regard to any other provisions of law governing the expenditure of public funds. All such compensation, expenses, and allowances shall be paid out of funds made available by this Act.

INSURANCE OF FINANCIAL INSTITUTIONS

SEC. 2. The Administrator is authorized and empowered, upon such terms and conditions as he may prescribe, to insure banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies, and other such financial institutions, which are approved by him as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them subsequent to the date of enactment of this Act and prior to January 1, 1936, or such earlier date as the President may fix by proclamation, for the purpose of financing alterations, repairs, and improvements upon real property. In no case shall the insur-

ance granted by the Administrator under this section to any such financial institution exceed 20 per centum of the total amount of the loans, advances of credit, and purchases made by such financial institution for such purpose; and the total liability incurred by the Administrator for such insurance shall in no case exceed in the aggregate $200,000,000. No insurance shall be granted under this section to any such financial institution with respect to any obligation representing any such loan, advance of credit, or purchase by it the face amount of which exceeds $2,000; nor unless the obligation bears such interest, has such maturity, and contains such other terms, conditions, and restrictions, as the Administrator shall prescribe.

LOANS TO FINANCIAL INSTITUTIONS

SEC. 3. The Administrator is further authorized and empowered to make loans to institutions which are insured under section 2, and to enter into loan agreements with such institutions, upon the security of obligations which meet the requirements prescribed under section 2. Such loans or agreements may be made for the full face value of the obligations offered as security, and shall be at such rates and upon such terms and conditions as the Administrator shall determine.

ALLOCATION OF FUNDS

SEC. 4. For the purposes of carrying out the provisions of this title and titles II and III, the Reconstruction Finance Corporation shall make available to the Administrator such funds as he may deem necessary, and the amount of notes, debentures, bonds, or other such obligations which the Corpora-

tion is authorized and empowered to have outstanding at any one time under existing law is hereby increased by an amount sufficient to provide such funds: *Provided*, That the President, in his discretion, is authorized to provide suuch [1] funds or any portion thereof by allotment to the Administrator from any funds that are available, or may hereafter be made available, to the President for emergency purposes.

ANNUAL REPORT

SEC. 5. The Administrator shall make an annual report to the Congress as soon as practicable after the 1st day of January in each year of his activities under this title and titles II and III of this Act.

Regulations of the Federal Housing Administration approved July 15, 1935:

REGULATION NO. 10

(Applicable to all loans)

The question of the financial condition of the borrower is left to the reasonable judgment of the insured institution as a credit matter. The borrower must furnish the lending institution a financial or credit statement, approved as to form by the Administrator, which in the judgment of the insured institution shows the borrower to be solvent, with reasonable ability to pay the obligation and in other respects a reasonable credit risk in view of the insurance provided by the National Housing Act.

[1] So in original.

REGULATION NO. 15

(Applicable to all loans)

Claim for reimbursement for loss on a qualified note may be made to the Administrator at any time after payment of such note has been in default for a period of 60 days. The Administrator in his discretion may at any time or from time to time call for a report from any insured institution on the delinquency status of the obligations held by such institution and reported to him for insurance.

If within the first year after default the borrower has not made payments on his obligation aggregating at least 10% of the balance due on the date of default, claim must be made within 30 days thereafter. If in any subsequent six-month period the borrower has not made payments aggregating at least 5% of the unpaid balance as of the beginning of such period, claim must be made within 30 days thereafter.

REGULATION NO. 17

(Applicable to all loans)

Claims must be made on the proper form, which must be filled out completely and executed in duplicate by a duly qualified officer of the insured institution. If the Regulations have been complied with, payment of the loss incurred will be made upon audit of the claim and upon proper endorsement to the Administrator of the note upon which the loss occurred. If judgment has been taken, assignment of the judgment must be made.

Circular letter of Federal Housing Administration to Financial Institutions, dated July 26, 1937:

To: FINANCIAL INSTITUTIONS.

Insured institutions filing any claim under their insurance contract are advised hereafter to assign all evidences of debt, and any security therefor, to the United States, using the following form of assignment:

"All right, title an dinterest of the undersigned is hereby assigned to the United States of America.

_____
Financial Institution

By _____

Title _____"

Very truly yours,

R. S. HARLAN

ROBERT S. HARLAN

Director of Title I.

CONTRACT OF INSURANCE

No. 735

2 04 19 0640 1

Whereas California Bank, of Los Angeles, California, hereinafter called the Financial Institution, is approved by the Federal Housing Administrator, acting for and on behalf of the United States of America pursuant to authority granted him by law (hereinafter referred to, acting in such capacity; as the Administrator), as an institution eligible for credit insurance under the provisions of Section 2 of the National Housing Act.

Now therefore, in consideration of the stipulations mentioned, the Administrator does hereby insure the Financial Institution pursuant to and under the Regulations printed on the back hereof which are hereby made a part of this contract.

The Administrator further agrees to lend to the Financial Institution, upon the security of notes in good standing and covered by the insurance, such amounts, up to 100% of the current face value of such notes offered for security, as the Financial Institution may request at a rate of interest to be determined by the Administrator. Such loans will be made subject to due execution of an agreement on the part of the Financial Institution satisfactory to the Administrator, placing the duty upon the Financial Institution to collect payments on such notes and to hold the same in trust for, or remit to the Federal Housing Administration, to apply against the loan or otherwise, as the Administrator may direct.

This Contract may be terminated at any time by the Administrator upon giving the Financial Institution at least five days prior written notice of its intention so to do, and in all events this contract shall terminate at the close of business on December 31, 1935, provided however, that in the absence of fraud on the part of the Financial Institution the termination of this contract shall not affect the insurance coverage as to those notes taken or purchased while this Contract was in effect and shall not affect the agreement of the Administrator to lend to the Financial Institution as above set forth.

In witness whereof, the Administrator has executed and attested these presents for and on behalf of the United States of America this Tenth day of August 1934, at Washington, D. C.

UNITED STATES OF AMERICA,
JAMES A. MOFFETT,
Federal Housing Administrator.

Form FHE 3-CS—Approved (July 15, 1935) Loans not exceeding $2,000

CREDIT STATEMENT

Dated _____, 193 , at _____, (City) _____ (State)

To _____

_____ (Address)

Name of applicant _____

_____ (Address)

The following information is given for the purpose of inducing you to grant credit under the provisions of Title I of the National Housing Act.

The approximate amount of credit required by me (us) for ____ months is $_____.

Married or single_____. Age_____. Number of dependents_____. How long at present address_____.

Give name of banks or other institutions at which checking, savings, and other accounts are carried

_____

_____

Business references_____

_____

EMPLOYMENT OR BUSINESS

Now employed by_____

Business address _____

Position occupied_____. How long with present employer_____. Time unemployed last three years_____

If applicant is owner of business, what kind?

_____

State whether doing business as individual, partnership, or corporation_____

Length of time in present business_____

INCOME

Salary, commission—or net profit if in business—per year ---------- $------
Other income per year (state source)------
---------- $------

How income is received (weekly, monthly, etc.) ------ Portion derived from farming -------- Total ---------- $------

OBLIGATIONS

Bank, finance, loan or installment companies, or others, to whom you are making installment payments (exclusive of real estate mortgages). If none, state "None"	Original amount	Unpaid balance	payment (Weekly, monthly, etc.)
----------	$------	$------	$------
----------	$------	$------	$------
----------	$------	$------	$------
----------	$------	$------	$------

Have you any judgments or legal proceedings pending against you?-------- If so, give particulars
----
Have you applied for or received a loan or loans under the National Housing Act?----------
From whom and for what purposes ----------

Aggregate original amount, $----------
Was application accepted or declined?----------

[Both sides of this form must be filled out]

PROPERTY TO BE IMPROVED

Location of property to be improved:
---------- ---------- -------
(Street and number) (City) (State)
Description and use of above property----------

Describe improvements or installation planned	Estimated cost	Contractor, dealer, etc.	
		Name	Address
	$		
	$		
	$		
	$		
	$		

If you rent the property, fill in the following:
Renting property from_____
When does lease expire?_____
If you own the property, fill in the following:
Name in which title appears_____
Estimated value_____ $_____
Total of mortgages or other liens against this property _____ $_____
Is any mortgage or other lien in default in any respect? _____
If so, what arrangements have been made?_____
_____
Is mortgage held by Home Owners' Loan Corporation?_____
If so, do present monthly payments include principal and interest?_____
Are any such payments overdue?_____
If so, for how long?_____
State whether or not all taxes, assesssments, and fire and other insurance premiums are paid up to date (yes or no)_____
Estimated value of other real estate owned_____ $_____
Total of mortgages or other liens against such other real estate owned, $_____
Are any in default?_____
Are all owned structures covered by insurance?
_____

I (we) authorize you, or any financial institution to which you may desire to offer my (our) note for

sale, to obtain such information as you (they) may require concerning the above statement and agree that it shall remain your (their) property whether or not my (our) note is finally accepted by you. I (we) certify that if the loan is granted to me (us) or my (our) note purchased, the entire proceeds will be used exclusively in payment for alterations, repairs, improvements, and/or the purchase and installation of eligible equipment and machinery on the property described above. I (we) hereby affirm that the foregoing information is true and correct.

(Signature)_____ [L. S.]

_____ [L. S.]

(Wife or husband)

[Both sides of this form must be filled out]

Executive Order No. 7280, promulgated January 28, 1936:

EXECUTIVE ORDER

EVIDENCING, VALIDATING, AND CONFIRMING THE CREATION OF THE FEDERAL HOUSING ADMINISTRATION

WHEREAS the National Housing Act, approved June 27, 1934 (48 Stat. 1246), authorized the President to create a Federal Housing Administration and to appoint a Federal Housing Administrator to exercise all the powers of said Administration; and

WHEREAS, pursuant to such authorization, I did on the 30th day of June 1934 create the Federal Housing Administration, and did on the 30th day of June 1934 appoint a Federal Housing Administrator, whose appointment was confirmed by the Senate of the United States on January 18, 1935; and

WHEREAS since the said 30th day of June 1934 the powers, duties, and functions of the

Federal Housing Administration have been exercised and performed by the Federal Housing Administrator:

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States, do hereby issue this Executive order as evidence of the creation of the said Federal Housing Administration, and do hereby in all things validate and confirm the creation thereof.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
January 28, 1936.

Letter of Comptroller General to Federal Housing Administrator:

COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, January 23, 1936.

A-51615

ADMINISTRATOR, FEDERAL HOUSING ADMINISTRATION.

SIR: There was received by your direction the letter of your Comptroller, dated October 19, 1935, as follows:

"In connection with the administration of the National Housing Act, the Federal Housing Administration receives the following collections:

"*Collections—Insured Losses (Title I, Act of June 27, 1934).*—These receipts are the results of the collection efforts of the Federal Housing Administration to recover on the notes receivable and collateral assigned to the Federal Housing Administration as the results of the insured losses paid financial institutions under the provisions of Title I, Section 3 of the Act, supra. It is recommended that this be covered in the

Treasury as a miscellaneous receipt under the caption suggested.

"*Collections on Loans to Financial Institutions.*—These collections are repayments on the advances made under the provisions of Title I, Section 3 of the Act, to financial institutions secured by insured modernization loans. In view of the fact that these are real loans which are fully secured, etc., and not ordinary expenditures or sales of Government property, it is recommended that these funds be handled as a repayment to OX–681, Renovation and Modernization Loans and Insurance.

"*Interest on Loans to Financial Institutions.*—These collections are in payment of interest to the Federal Housing Administration on account of loans made under the provisions of Section 3 of the Act. It is recommended that they be covered in the Treasury as miscellaneous receipts.

"*Premiums, Mutual Mortgage Insurance.*—These are trust funds received from the mortgagees as a part of their contribution to the Mutual Mortgage Insurance Fund on account of insured mortgages. The premiums are paid annually in advance. It is recommended that they be covered in the Treasury as trust funds for the account of the Mutual Mortgage Insurance Fund.

"*Appraisal Fees, Mutual Mortgage Insurance.*—These are collections from the mortgagees to partially reimburse the Government for the cost of appraising the property offered as security for insured mortgages. It is recommended that these collections be covered in the Treasury as miscellaneous receipts.

"*Interest on Investments, Mutual Mortgage Insurance Fund.*—These are trust-fund receipts on the investments of the

Mutual Mortgage Insurance Fund. It is recommended that they be covered in the Treasury as trust funds for the account of the Mutual Mortgage Insurance Fund.

"Your decision as to the proper receipt symbols and titles and instructions as to the disposition of these funds are requested. The foregoing receipt titles are suggested for your consideration in assigning symbols and titles. As received, the collections are deposited as 'Special Deposits' with the Chief Disbursing Officer of the United States."

In the absence of any provision in Title I of the act of June 27, 1934, 48 Stat. 1246, to the contrary, all receipts in connection with the operations under said title are for covering into the Treasury as miscellaneous receipts. Accordingly, the following receipt symbols and titles have been set up on the books of the Government, and such collections now in the hands of disbursing officers should be immediately covered into the Treasury to the credit of the appropriate account:

7051. Collections — Insured Losses (Title I, Act of June 27, 1934)
7052. Collection of Loans to Financial Institutions
7053. Interest on Loans to Financial Institutions

Section 202 of the said National Housing Act of June 27, 1934, 48 Stat. 1248, provides:

"There is hereby created a Mutual Mortgage Insurance Fund (hereinafter referred to as the 'Fund'), which shall be used by the Administrator as a revolving fund for carrying out the provisions of this title as hereinafter provided, and there shall be allocated immediately to such Fund the sum of $10,000,000 out of funds made available to

the Administrator for the purposes of this title."

In view of this provision for a revolving fund to carry out the provisions of this title, any collections made in connection with the carrying out of said provision—and with respect to which the act does not provide for other disposition—are properly for credit to the said revolving fund. Accordingly, collections received, such as premiums, appraisal fees, and interest on investments, will be deposited to the credit of said revolving fund, and the title of the account now appearing on the books of the Government under the caption "OS353 Mutual Mortgage Insurance Fund, Federal Housing Administration, S. F.," has been changed to "OS353 Mutual Mortgage Insurance Fund, Federal Housing Administration, Revolving Fund."

The funds heretofore deposited to the credit of the receipt account "8146 Interest Earned on Investments, Mutual Mortgage Insurance Fund, Federal Housing Administration" and appropriated to account "OT355 Mutual Mortgage Insurance, Earned Interest Fund, Federal Housing Administration, Trust Fund" will be transferred to the revolving fund by transfer appropriation warrant, and the use of the two accounts for recording interest collections will be discontinued.

Respectfully,

J. R. McCARL,
Comptroller General of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1939

No. 544

In the Supreme Court
of the
United States
October Term, 1938

THE UNITED STATES OF AMERICA,
vs.
EDWARD H. MARXEN, Trustee of Monterey Brewing Company, a corporation, Bankrupt.

On Certificate From the United States Circuit Court of Appeals for the Ninth Circuit.

Brief of Trustee, Appellee

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No. 544

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Introduction

The Appellant's brief under "QUESTIONS PRESENTED," sets forth the facts. This brief will be limited, under the question "certified" by the United States Circuit Court of Appeals, Ninth Circuit to this Honorable Court, under Point 3 of said brief, to wit:

"Whether the Government's claim is entitled to priority under Section 64b (7) of the Bankruptcy Act as amended, and Revised Statutes Section 3466." The questions of "Whether the claim filed in the bankruptcy proceedings is a claim of the United States" and "Whether the Government's claim was provable in bankruptcy, where, after the petition in bankruptcy was filed the Government discharged the obligation to the payee of the bankrupt's note and obtained an assignment of the note" will be answered by HARRY LOEB MOSTOW, *amicus curiae.*

Point I.

There Was No Debt Due to the United States Within the Meaning of Section 64(b) of the Bankruptcy Act (11 U. S. C. A. Section 104(b)) and Section 3466 of the Revised Statutes (31 U. S. C. A., Sec. 191) at the Time of Adjudication in Bankruptcy so as to Enable Appellant to Priority Over Other Creditors.

Summary of arguments

The United States not being a creditor of the bankrupt and not having a provable claim in bankruptcy on the date of adjudication and only becoming the owner of the promissory note by reason of an assignment made to the United States by the California Bank four months after adjudication by reason of its contract of insurance with the California Bank under the Federal Housing Act, the United States of America

only became subrogated to the same rights that the California Bank had at the time of bankruptcy, to wit, a general claim at most, and is not entitled to priority within the meaning of Section 3466 of the revised Statutes. There can be no equitable claim in favor of the United States as no privity of contract existed between the bankrupt and the United States at the time of the loan or at any other time.

Argument

The question certified by the United States Circuit Court of Appeals, Ninth Circuit, has never been decided before by this court or any Circuit Court up to the time of certification. The question of whether the United States of America has priority in a bankruptcy proceedings as against other creditors or claimants where, four months after adjudication in bankruptcy the United States took an assignment of a note obligation from a bank which was insured against loss under the Federal Housing Act where the bank would have no priority had it filed a claim in the bankruptcy proceedings, is of vast importance not insofar as it affects this proceedings alone, but in order to establish a uniform decision and final precedent throughout the United States.

The appellant claims priority under Section 3466 of the revised Statutes. To come within the purview of the section the appellant must show that not only is the debt due to the United States but also that the debt was provable and one owing to the United States by

the bankrupt *at the time of the filing of the petition in bankruptcy.* The United States of America in its brief (appendix) has carefully covered certain portions of the National Housing Act vital to this question, and we submit from the act itself, the United States of America was acting thru the Federal Housing Act in the capacity of an *insurer* against credit losses. That the United States did *insure* the bank is apparently conceded by the parties herein.

District Judge Moscowitz in the *matter of T. N. Wilson, Inc.*, 24 Fed. Sup. 651 (E. D. N. Y.) refers to the provisions of title I, Section 2 of the National Housing Administration (12 U. S. C. A., 1701, et seq.) as a contract of insurance executed by the Federal Housing Administrator in favor of the National City Bank insuring the Bank against credit losses which it might sustain as a result of notes purchased or loans thereafter made.

The facts in the case before this court are in direct parallel with those involved in the case of *Federal Housing Administrator vs. Moore, etc.*, Reported in 90 Fed. (2d) 32 (C. C. A., 9th) where a claim for similar preference was denied. In the case of *Wagner, as Trustee vs. Stewart McDonald, Federal Housing Administrator,* reported in 96 Fed. 2nd 273, 8th Circuit, the court held that a claim by the Federal Housing Administrator made in the bankrupt estate was in law that of the United States and hence was entitled to preference in the matter of payment. The marked difference

which is taken note of by the court (8th Circuit) in the *Wagner* case between the facts and the facts in the *Moore* case (9th Circuit) above cited, was that in the *Wagner* case, being considered by the court (8th Circuit), the Housing Administrator *had full title to the claim before Bankruptcy intervened,* the court (8th Circuit) saying:

> "The court in the *Moore* case emphasized the fact that the debt was assigned to the Administrator *after the date of adjudication.* The fact situation is different here."

To hold that the United States has priority where the United States secured the claim by assignment to it after *adjudication in bankruptcy,* would mean to overrule the various United States District Court Judges and decisions by State Courts who have passed directly on the identical question involved in this appeal in the following recently decided cases

It was held *in re Stamford Auto Supply Company,* United States District Court, N. D. Texas, November 30th, 1938, and reported in 25 Fed Supp. p. 530, *that a claim acquired by the Federal Housing Administrator subsequent to the adjudication in bankruptcy of the debtor is not entitled to priority.*" The opinion is as follows:

> "DAVIDSON, DISTRICT JUDGE. The Stamford Auto Supply Company, a partnership, was adjudged a bankrupt on April 10, 1937. About March 19, 1936, the bankrupt executed a note to

the Cimplicity Manufacturing Company, or order, secured by a chattel mortgage. About the 30th of March, 1936, the note was transferred by written assignment to Equipment Acceptance Corporation. On June 21, 1937, the balance due upon the note in the amount of $594.56 was sold and assigned to the Federal Housing Administrator, acting on behalf of the United States of America. The Federal Housing Administration, allegedly acting for the United States, has filed its claim in the bankruptcy proceedings, claiming priority under subsection 7 of Section 64(b) of the Bankruptcy Act, which provides that in case of an insolvent estate the government will have priority for its debts over all other creditors.

"It is the opinion and judgment of the court that the debt is one due the United States and that the Federal Housing Administration is but an agency of the government, charged with the use of certain funds and the performance of certain duties for the government itself. While it is now a debt of the United States it is not entitled to the priority of classification ordinarily given such indebtedness by the Bankruptcy Act. When the Stamford Auto Supply Company was adjudged a bankrupt, the status of its indebtedness was fixed. The debt was not assigned to the Federal Housing Administrator until after the bankruptcy adjudication. The statutes refer only to debts which the government owns at the time that the insolvency or bankruptcy is determined and not to those subsequently acquired. To hold to the contrary would authorize representatives of the various government agencies, by simple act of purchase,

to give one creditor a preference over another, a preference that did not exist at the time a bankrupt was adjudicated as such. The claim will be classified as an unsecured debt only."

Justice Roudebush in the case of *Paul vs. Paul Lighting Fixture Company,* Ohio, Sup. Ct., held on November 30th, 1938, reported in ..... *"that the rights of the creditor are fixed at the time of the receiver's appointment, thus making an assignment from a creditor bank to the United States after the appointment of general claims in the hands of the United States instead of one entitled to priority."* The opinion of the court is as follows:

"ROUDEBUSH, JUSTICE. This cause comes before the court on the intervening petition of the United States in which it seeks priority for a claim in the sum of $2,682.04. The Paul Lighting Fixtures Company borrowed $3,000 from the Peoples Bank and Savings Company on a F. H. A. loan, which means that the bank was insured against loss on the loan by the Federal Housing Administration Act.

"On December 30, 1937, a receiver was appointed for the Paul Lighting Fixtures Company, and the court made an order requiring that all claims against the estate be filed on or before March 1, 1938. On January 27, 1938, the bank filed a claim for the balance due.

"On February 18, 1938, the bank filed a claim with the Federal Housing Administrator for the payment of the balance due on the notes. On

May 5, the administrator allowed the bank's claim; thereupon the bank assigned the two notes to the F. H. A. acting on behalf of the United States. On May 14, the United States district attorney filed claims against the receiver for priority.

"The only question involved in this case is whether the United States Government is entitled to priority in payment of the claim of the Peoples Bank & Savings Company, the receiver having allowed its claim as a general claim but rejected it as a priority claim.

"The rule that the rights of creditors are fixed at the time of the receiver's appointment is clearly established. The assignee stands in the shoes of the assignor and the United States could have no better title than the Peoples Bank & Savings Company.

"Order affirmed."

Justice Millard *in re Dickson,* Wash. Sup. Ct., decided November 30th, 1938, and reported in 84 Pac. (2d) pg. 661, held that where the Federal Housing Administrator paid the bank the unpaid balance on the note *prior to adjudication of insolvency* the United States had priority. The opinion of the court is as follows:

"MILLARD, JUSTICE. On December 5, 1935, Thomas Dickson borrowed $1,066.64 from the Citizens Bank of Bremerton under the terms of the Federal Housing Administration Act. Under the Housing Act, the lending bank was insured against any loss sustained by it as a result of the loan to Dickson.

"On default of Dickson, the Federal Housing Administrator paid to the lending bank by draft on the Treasury of the United States, the unpaid balance due on the note. Thereupon, and *prior to adjudication of insolvency* of Dickson the bank assigned the note to the Federal Housing Administrator. On January 25, 1935, following his application for appointment, J. G. Dickson was appointed guardian of the estate of Thomas Dickson who was adjudged incompetent by reason of insanity.

"An order was entered by the court January 10, 1938, adjudging the estate of the incompetent to be insolvent. The claim of the United States was denied priority and the claim of the state of Washington was allowed priority for occupational and sales tax debts, owed by the incompetent to the state.

"Section 3466, R. S., 31 U. S. C. A. Sec. 191, confers the right of priority. Priority under the statute extends to all classes of debts due the United States. Where the debtor is divested of his property, as in the case at bar, the guardian or person who becomes invested with the title is made trustee for the United States and bound first to pay its debt out of the debtor's property. The priority given to the United States by the statute cannot be impaired or superseded by state law.

"Order reversed."

On September 9th, 1938, District Judge Patterson *in re Miller,* U. S. Dist. Ct., S. D. N. Y., reported in 25 Fed. Sup. 336, held that the assignment of bankrupt's

note by a bank to the Federal Housing Administrator after the filing of the petition in bankruptcy does not operate to give the debt priority as a debt owing the United States. The opinion follows:

> "PATTERSON, DISTRICT JUDGE. At the time of the filing of the petition the bankrupt was indebted to the National City Bank on a note covering a loan made by the bank for housing improvement. The bank was insured against loss by the Federal Housing Administrator. Proof of claim was filed by the bank. Later the Administrator reimbursed the bank, took assignment of the note and filed proof of claim purporting to act in behalf of the United States and claiming priority. The referee held that the claim was entitled to priority under section 64(b) (7) of the Bankruptcy Act and 31 U. S. C. A., section 131 as a debt owing the United States.
>
> "The order granting priority is reversed. It is not necessary to decide whether the debt is one owing the United States. The decisive fact is that the bankrupt did not owe a debt to the Federal Housing Administrator at the time the petition was filed. *The substantive right of a creditor to share in a bankrupt estate depends on the status of his claim at the time the petition was filed.* So too the right of a creditor to priority depends on the situation existing when the petition was filed. The claim should not have been accorded priority."

The decisive fact in the above cases and the one at bar is that the bankrupt did not owe a debt to the United States at the time when the petition in bank-

ruptcy was filed or at any earlier time. The claims in question were, at the time of adjudication in bankruptcy, debts owing to banks or other firms simple debts which would not rate priority under the Bankruptcy Act in favor of the bank or those making the loans. The passing of these claims to the Federal Housing Administrator or the United States or, as in the case before this court, four months after adjudication by assignments after the petition in bankruptcy was filed, did not promote it from the ranks of general creditor to a position of leadership. The rights of creditors both against the bankrupt and among themselves are fixed as of the time when the petition is filed. See *White vs. Stump*, 266 U. S. 310, 313:

> "The substantive right of a creditor to share in a bankrupt estate to any extent depends on the status of his claim at the time when the petition in bankruptcy was filed. *Zavelo vs. Reeves*, 227 U. S. 625; *Williams vs. United States Fidelity & Guaranty Co.*, 236 U. S. 549. So too the right of a creditor to priority over other creditors in the distribution of an estate depends on the situation existing when the petition was filed. *In re Winfield Mfg. Co.*, 140 Fed. 185 (D. C. Pa.) If the claim was one not entitled to priority at that time, a later event will not confer priority. *In re C. H. Earle, Inc.*, 2 Fed. Supp. 15 (D. C. N. Y.), affirmed 65 Fed. (2d) 1013 (C. C. A. 2), certiorari denied 290 U. S. 674. See also *In re Gasteiger & Co.*, 25 Fed. (2d) 642 (C. C. A. 2); *In Re Photo Electrotype Co.*, 155 Fed. 684 (D. C. N. Y.); *In Re Waverly Typewriter* (1898), 1 Ch. 699. Were the rule

otherwise the United States or a state might buy up claims of mere general creditors. The assignment of the bankrupt's note by the bank to the Federal Housing Administrator after the petition in bankruptcy was filed did not disrupt the equality among creditors prevailing at the time the petition was filed."

The administrator is claiming a priority or preference which the bank did not have and which preference was not accorded to the administrator by the law which was a basis of the contract of *insurance* between the bank and the Administrator.

In *Davis vs. Pringle,* 268 U. S. 315, at page 318, it was said:

"The priority claimed by the United States is not given to it by the law."

In considering whether Congress intended to prefer the Administrator in bankruptcy proceedings on debts which might become due him, let us examine the amendments to the National Housing Act enacted by Congress. The amendments to the statute (April 17th, 1936) indicate the intention to exclude the Administrator in the operation of other laws generally.

Section 1703(c) provides:

"Notwithstanding any other provisions of law, the Administrator shall have the power, . . . to collect or compromise all obligations assigned to or held by him. . . ."

Section 1703(e) provides:

"The Administrator is authorized to waive compliance with regulations . . . . with respect to the interest and maturity of and the terms, conditions and restrictions under which loans, . . . may be insured. . . ."

"By the National Housing Act the Administrator could appoint and compensate assistants without regard to the provisions of other laws . . . delegate the powers and functions conferred upon him . . . make expenditures as are necessary . . . without regard to any other provisions of law governing the expenditure of Public funds . . . . could sue or be sued in his official capacity."

The Administrator's claim became provable only after payment by the Administrator to the California Bank and an assignment of the note was made by the bank to the Administrator during the bankruptcy proceedings. The California Bank treated the note and claim as its own until four months after bankruptcy when it assigned the note to the Government. The petition in bankruptcy was filed on April 5th, 1937. No claim was filed by the Federal Housing Administrator until August 4th, 1937.

The appellee submits that the determination of the case at bar must be on the facts as they exist in this case and not on what the facts may or could have been if the Administrator had taken an assignment of the note prior to the filing of the petition as was done in

Wagner vs. McDonald, Federal Housing Administrator, 93 Fed. (2d) 273, and *in Re Dickson's Estate,* 84 Pac. (2d) 661, *supra.* In considering the Appellant's argument that the appellant was the bankrupt's absolute surety on the note it might be well to consider the following facts.

The statute was enacted in June, 1934. The contract of insurance between the appellant and the California Bank was entered into on August 10th, 1934. The bankrupt's note was made on January 2nd, 1936. There was no default until February 2nd, 1937. The petition in bankruptcy was filed April 5th, 1937.

The bank could already have exceeded the quota of losses for which the appellant was liable for indemnification to the bank before the petition was filed in which case there could be no claim for indemnity.

The language *in Re Roth and Appel,* 181 Fed. 667 (C. C. A. 2), (1910), which was a case dealing with liability for future rent after a petition in bankruptcy had been filed, is well applicable to the case at bar. The court said at page 669:

> "It follows from these principles that rent accruing after the filing of a petition in bankruptcy against the lessee is not provable against this bankrupt estate as 'a fixed liability . . . absolutely owing at the time of the filing of the petition,' within the meaning of section 63a (1) of the bankruptcy act of 1898. It is not a fixed liability, but is contingent in its nature. It is not absolutely

owing at the time of the bankruptcy, but is a mere possible future demand. Both its existence and amount are contingent upon uncertain events. (Citing cases.)"

In conclusion, the court said:

> "For these reasons, we think that the claim of the appellant, whether regarded as one for unaccrued rent or for indemnity for loss of rent, was not provable against the bankrupt estate under either section 63a (1) or 63a (4), and was properly expunged by the District Court."

This decision was followed in 291 U. S. 320. In *Zavelo vs. Reeves,* 227 U. S, 625, the United States Supreme Court in referring to Section 63 and its subdivisions, held that in considering the section in question, in light of the spirit and purpose of the acts, debts founded upon open account or upon contract, express or implied, that are provable under section 63a (4) include only such as existed at the time of the filing of the petition in bankruptcy. Mr. Justice Pitney, who delivered the opinion of the court, said:

> "The view above expressed as to clause 4 of section 63a is the same that has been generally adopted in the Federal District Courts."

The Appellee submits the rule that only those debts which have matured and are absolute at the time of the filing of the petition are provable is as equally applicable to claims made by individuals as to claims made by the United States.

The law is stated in *Gilbert's Collier on Bankruptcy*, Second Edition, pages 975-6, that under section 63a (4) the time of the filing of the petition controls and if the debt is owing at that time it may be proved; if not, it is not susceptible to proof.

The filing of the petition in bankruptcy in the case at bar did not establish *ipso facto* a liability on the part of the Federal Housing Administrator to the bank. Certain conditions had to be fulfilled by the bank before it could make claim against the Administrator. Moreover, the bank was not compelled to seek indemnity from the Administrator nor, as has been pointed out, was the Administrator liable to the bank in the event the bank had already exceeded its quota of losses under the statute.

Neither the note nor the so-called contract of suretyship between the bank and the Administrator, provided that the filing of a petition in bankruptcy by the maker matured and made absolute the obligation on the part of the Administrator to indemnify the bank.

In the case of *In re Casualty Company of America, In Re Surety Claim No. 633 of the United States,* 187 N. Y. Supp. 849 (affirmed 232 N. Y. 559), priority was accorded to the Government on a recognizance in a criminal case. There the obligation to the Government was absolute at the time the bond was given. The bond, by its terms, provided that if the principal failed to appear, the surety company would be liable. The obligation to the Government was fixed and absolute

and the time of the occurrence of the breach was not important insofar that pursuant to the provisions of the bond a failure to appear on the part of the principal *eo instante* matured the obligation. The opinion *in re Casualty Company of America, In Re Surety Claim No. 633 of the United States Supra,* decided in April, 1921, and affirmed in December, 1921, stated:

> "Until, therefore, the United States courts or Congress shall establish the rule as held by our state . . . as to claims which have matured at the commencement of proceedings for determining the insolvency of the debtor, this court should, I think, give priority as to all claims of the United States government which have matured prior to the actual distribution of the insolvent's property."

In the above case, the court relied on *Lewis, Trustee vs. The United States,* 92 U. S., pg. 618, cited by appellant in its brief, on page 24.

Four years later in *Davis vs. Pringle,* 268 U. S. 315, also cited by appellant on page 19 of its brief, the Supreme Court of the United States rejected the old rule enunciated in the early cases which gave priority to the United States as a sovereign prerogative, irrespective of the provisions of the statute.

In 1937, in the case of *Continental Illinois Nat. Bank & Trust Co., of Chicago v. Chicago, R. I. & P. Ry. Co., et al.,* 294 U. S. 658, 684, the United States Supreme Court held that where the statute creating

the agency failed by its terms to grant priority or special treatment to the Government's agencies, none would be given by the courts.

The following cases, *Maynard vs. Elliot,* 283 U. S. 273, and *Williams vs. U. S. Fidelity Company,* 236 U. S. 549, enunciated the principle that the filing of a petition in bankruptcy, in effect, caused bankrupt's contingent obligations to mature, and one having a contingent claim against the bankrupt (except for future rent) had a provable claim. These cases did not involve a statement of facts such as in the case at bar where the rights under the independent contract between a creditor of the bankrupt and a third party insurer or indemnitor were fixed not only by contract, but also by a statute (See *In Re Paramount Publix Corporation,* 72 Fed. (2d) 219, and *Central Trust Company vs. Chicago Auditorium,* 240 U. S. 581.)

Justice Holmes, in the case of *Sexton vs. Drayfus, et al.,* 219 U. S., Page 339, decided in January, 1911, said:

> "For more than a century and a half, the theory of the English bankruptcy system has been that everything stops at a certain date. . . . The rule is not unreasonable when closely considered, it simply fixes the moment when the affairs of the bankrupt are supposed to be wound up. . . . At that moment the creditors acquire a right *in rem* against the assets. . . . The rule under discussion fixes the moment in all cases at the date which the petition is filed, . . ."

There is no dispute that the administrator who became subrogated to the rights of the bank against the bankrupt, had the same rights as the bank. The test is whether all the facts necessary to be proved to fasten liability accrued at the time of the filing of the petition. The contingency, in other words, is a contingency of facts to fasten liability at all, not a contingency as to the extent of the damages nor a contingency of the court's judgment on facts.

The Appellee asserts that the filing of the petition in bankruptcy did not, under the contract between the bank and the Administrator, give rights *ipso facto* and *eo instante* to an obligation on the part of the Administrator to reimburse the bank because there was a question of quota of losses first to be demonstrated and secondly it was optional with the bank as to whether it would call upon the Administrator for reimbursement. So long as it remained uncertain whether the contract between the bank and the Administrator would give rise to an actual duty or liability and there was no means of removing the uncertainty by calculation, it was too contingent to be a provable debt in bankruptcy. Neither of these contingencies became dissolved into a certainty by the filing of the petition as is illustrated by the fact that the bank could have filed a claim in its own name and for its own benefit in the bankruptcy proceedings.

Until June 22nd, 1938, at which time Chapter 575, Section 1 (52 Stat. 873) was enacted, there was no pro

vision in the bankruptcy act for the proof of "Contingent Debts and Contingent Contractual Liabilities." If "contingent debts" and "contingent contractual liabilities" were provable and accrued by the filing of the petition in bankruptcy, there would have been no reason for Congress to have inserted in Section 63a the following new matter, to wit:

> "Debts which may be proved . . . . (8) contingent debts and contingent contractual liabilities; . . ."

Moreover, the Administrator is claiming a priority or preference which the California Bank itself did not have and which priority or preference was not accorded to the Administrator by the statute which was the basis for the contractual obligation between the California Bank and the Administrator, whereby the terms and conditions of said contract the United States, acting through the Federal Housing Administrator insured the California Bank against credit losses.

The Federal Housing Administrator is engaged in the business of insuring credits and without questioning the beneficent motive, it is nevertheless engaged in a private endeavor, and as was held in *Sales vs. United States,* 234 Fed. 842 (C. C. A. 2, 1916):

> "When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation."

The case of *Howe vs. Shepard,* 2 Sumner 133, cited by appellant, in its brief on page 22 and page 24

is one where an indebtedness to the United States on duty bonds was involved, and upon which a judgment was entered, the Circuit Court held that the assignment of the Judgment to the United States by Howe and Howard did in equity, transfer the debt to the United States. This apparently is another case where a debt actually existed, and in which the United States was entitled to priority.

In examining the other authorities cited by appellant, on pages 21 and 22, it is obvious that either there was a fixed debt at the time of adjudication or taxes were involved, or a bond was issued by a bonding company running to the United States, all of which are entirely different from the state of facts involved in the case before this Court.

Appellant cites the case of *Bramwell vs. United States Fidelity Company,* 299 U. S. 483, in their brief on page 26. This is a case where a bond running to the United States was the subject matter, and where the surety takes the preference which the United States should have had under Section 3466 of the revised statutes, after the surety on the bond paid the United States and received an assignment of the rights of the United States against the principal. Appellant contends, that the "established rule of liberal construction requires that the priority act be applied having regard to the public good it was intended to advance. Its application is not to be narrowly restricted to the cases within the literal and technical meaning of the words used."

This contention is not tenable. In the *Bramwell* case there was a fixed liability by reason of its bond. In the case at bar, the liability was not fixed until four months after adjudication in bankruptcy, and then not until the Government paid the bank and took the assignment of the note, not as a surety, but as an insurer. Certainly a loan made by the bank to the brewing company and evidenced by a promissory note, which said note was a negotiable instrument, was a direct contract between the bank and the brewing company, and said transaction could not be deemed an equitable debt in favor of the United States under Section 3466 of the revised statutes.

Subdivision (i) of Section 57 of the Bankruptcy Act (11 U. S. C. A., 93 Subd. (i)) provides that:

> "Whenever a creditor whose claim against the bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharges such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditors."

This section, it will be observed, provides for the filing of the claim by (The United States or the Administrator, as the case may be) in the name of the creditor, (The California Bank) and for the subrogation to the rights of the principal creditor (The California Bank). The record shows that the claim as filed, was filed by the United States of America in its

own name and right and not in the name of the creditor (The California Bank).

Appellant contends the Canon of construction that the rights of the U. S. are not affected by general words of a statute, applies to the Bankruptcy Act, but cites no authorities for their contention.

The case of *United States vs. California,* 297 U. S. 175-186, holds:

> "The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated (See *Baltimore National Bank vs. State Tax Commission of Maryland,* 297 U. S., page 209, decided same day)."

In the *Nardone vs. United States,* 302 U. S. 379, 383, the court on page 383 said:

> "The canon that the general words of a statute do not include the Government or affect its rights unless the construction be clear and indisputable upon the text of the act does not aid the respondent. The cases in which it has been applied fall into two classes. The first is where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest. A classical instance is the exemption of the state from the operation of general statutes of limitation. The rule of exclusion of a sovereign is less stringently applied where the operation of the law

is upon *the agents or servants of the Government rather than on the sovereign itself.*"

From an analysis of the above entitled cases and the argument advanced by the United States when applied to the facts of the case at bar, the only reasonable conclusion and deduction that can be reached, is that they do not apply to and have no bearing, weight, or effect on, or in any way limit, enlarge upon or defeat subdivision i of Section 57 of the Bankruptcy Act, *Supra.*

Conclusion

In conclusion our contention is the U. S. did not acquire any greater rights than the Calif. Bank and Appellee feels that the question certified by the United States Circuit Court, Ninth Circuit, to this court should be answered in the negative, and that the claim of the United States of America be denied priority.

Respectfully submitted,

THOMAS S. TOBIN,
Attorney for Appellee.

CLARENCE HANSEN,
Of Counsel.
March, 1939.

No. 544

In the Supreme Court of the United States

October Term, 1938

THE UNITED STATES OF AMERICA,
vs.
EDWARD H. MARXEN, Trustee of Monterey Brewing Company, a corporation, Bankrupt.

On Certificate From the United States Circuit Court of Appeals for the Ninth Circuit.

Supplemental Brief of Trustee, Appellee

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Due service and receipt of a copy of the within is hereby admitted this _____ day of March, 2023.

_____

Attorney for _____

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Priority Attaches to the Claim and Not to the Claimant

Our contention that priority is attached to the debt and not to the person of the creditor, to the claim and not to the claimant is supported by the following cases:

In *Shropshire, Woodliff & Co. v. Bush, et al., Trustees,* 204 U. S. 186; 17 Am. B. R. 77, the Supreme Court of the United States settled this question. Shropshire, Woodliff & Co. had acquired a large number of claims for wages of workmen and servants, none of them exceeding $300.00 in amount, and all were within three months before the date of the commencement of the proceedings. The District Court disallowed the claims as prior, on the ground that, when filed, they were not due to workmen, clerks or servants. The Circuit Court of Appeals for the Sixth Circuit certified the question to the Supreme Court. In reversing the ruling of the District Court, the Supreme Court of the United States said:

> "The precise inquiry is whether the right of prior payment thus conferred is attached to the person or to the claim of the wage earner; if to the person, it is available only to him, if to the claim, it passes with the transfer to the assignee. . . . Regarding, then, the plain words of the statute, and no more, they (the descriptive words) seem to be merely descriptive of the nature of the debt to which priority is given. When one has incurred a debt for wages due to workmen, clerks or servants, that debt, within the limits of time and amount prescribed by the Act, is entitled to priority of payment. *The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant.* The Act does not enumerate classes of creditors and confer upon them the privilege of priority in payment, but, on the other hand, enumerates

> classes of debts as 'the debts to have priority.' . . . These debts were exactly within the description of those to which the Bankruptcy Act gives priority of payment, and they did not cease to be within that description by their assignment to another. The character of the debts was fixed when they were incurred and could not be changed by an assignment. They were precisely of one of the classes of debts which the statute says are 'debts to have priority.' " (Parenthetical matter and italics ours.)

In *In re Bennet, Trustee of the Hume Cooperage Co.*, 156 Fed. 173; 18 Am. B. R. 320, the Circuit Court of Appeals for the Sixth Circuit, in discussing the rights of an assignee of a prior claim, said:

> "Inasmuch as the contingent right of lien under 2487 does not depend upon the doing of any thing by the creditor, there is no reason why a priority or lien which attaches to the claim rather than the claimant, shall not be assignable."

The court then proceeded to follow the rule laid down in *Shropshire, Woodliff Co. v. Bush*, 204 U. S. 186, also referring to *Trust Co. v. Walker*, 107 U. S. 596, and *Buchanan v. Bowen*, 111 U. S. 776.

There are a multitude of authorities holding that the rights of creditors and the jurisdiction of the Bankruptcy Court *in rem* is acquired as of the date of the filing of the petition. See:

Acme Harvester Co. v. Beekman, 222 U. S. 300, 27 Am. B. R. 262;

Everett v. Judson, 228 U. S. 74, 30 Am. B. R. 1;
Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642, 36 Am. B. R. 754;
Hiscock v. Varick Bank, 206 U. S. 28, 18 Am. B. R. 1.

And there are also a multitude of authorities holding that the status of priority is unaffected by assignment, either before or after bankruptcy, which we do not propose to set out at length here.[1]

The case of *Howe v. Sheppard,* 2 Summ. 133, cited by the United States attorney is not in point on the most material fact involved in this proceeding. In the case at bar, at the date of the filing of the petition the bankrupt was not indebted to the United States or to the Federal Housing Administrator acting on behalf of the United States, in any amount at all. It was indebted to the Seaboard National Bank.

In the case of *Howe v. Sheppard,* cited by the Government, the decedent at the time of his death was actually indebted to the United States Government. The facts, as set out in the United States attorney's brief, point out that the judgment against Wood was obtained by Howe and Howard in the sum of $4,663.31 prior to September, 1830. It was as-

[1] *Matter of Dutcher,* 213 Fed. 908, 32 Am. B. R. 545 (Dist. Ct. Wash.);
Fuller v. Bennett, 152 Fed. 538, 18 Am. B. R. 443 (Dist. Ct. W. Va.);
Matter of Harmon, 128 Fed. 170, 11 Am. B. R. 64 (Dist. Ct. W. Va.);
Re Campbell, 102 Fed. 686, 4 Am. B. R. 535 (Dist. Ct. Wis.);
In re North Carolina Car Co., 127 Fed. 178, 11 Am. B. R. 588 (Dist. Ct. N. C.);
In re Partridge Lumber Co., 215 Fed. 973, 33 Am. B. R. 539.

signed to the United States Government in September, 1830. In December, 1830 the United States holding this assignment, brought an action against Wood on the judgment, in the name of Howe and Howard. The action was continued from time to time until October, 1834, at which time Wood died. There is no dispute as to the fact that in October, 1834 when Wood died, he was indebted to the United States Government on a debt which it had owned and held against him in the form of a judgment for a period in excess of three years. Such is not the case here, and we respectfully submit that the case of *Howe v. Sheppard* is not applicable.

The Question of Sovereignty

It seems to be the contention of the Government in this case that for us to assert that the acquisition by the United States Government of certain claims against the estate of a bankrupt and the enforcement of them, to the detriment of other creditors, would be a manifest injustice to other creditors, would be placing a strained construction upon the rule allowing the Government priority. This can be best answered by pointing out that in the case apparently most relied upon by the Government this very thing occurred. We refer to the fact that in the case of *Howe v. Sheppard,* the Government, by one means or another, acquired a private judgment which would

have, but for the Government's acquisition of it, been a general claim against his insolvent estate prior to his death and then proceeded to the exclusion of the other creditors, to satisfy itself. In these days of heavy income taxes it is a common thing for the Government to levy on property of income tax payers for unpaid income taxes and heavy penalties. It is not beyond the range of probability that if the rule sought here by the Government is sustained, the Federal Government could levy upon general unsecured claims on file in the bankruptcy proceedings where the estate would pay less than a hundred cents on the dollar, acquire possession of them by virtue of that levy after bankruptcy, and then proceed to enforce them in full against the bankruptcy estate, notwithstanding the fact that at the date of the filing of the petition they were ordinary provable claims. Such a situation is not a mere ephemeral or transitory possibility, but is an ever present probability.

In this day and age the activities of the Federal and State Governments are being expanded daily into the realm of private business to an extent unknown to the common law and unheard of at the time of the foundation of this Government. With rapidly changing economic conditions many of these governmental activities may seem necessary, and the writer of this brief has no desire to criticize or quarrel with this policy. We do, however, believe that where the Government engages in purely private enterprise, such as the lending of money to private borrowers,

the insuring of accounts receivable and of mortgages, and other similar activities, either in aid of or in competition with private banking or insurance business, and permits its funds and property used in connection with such activities, to be taxed by the States, and permits its officers and agents, either individual or corporate, to sue and to be sued, and pays interest on the funds to the agency carrying out the activity, it has so far abdicated its sovereignty in that respect as to place it on a level with the other creditors of the beneficiary of the Government's aid who likewise loans money or delivers merchandise to the debtor.

In *Sloan Shipyards Corp. et al. v. United States Shipping Board Emergency Fleet Corporation et al.*, 258 U. S. 459, 42 Sup. Ct. 386, 48 Am. B. R. 249, the Supreme Court of the United States, speaking through Mr. Justice Holmes, said:

> "These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exon-

erates him. Supposing the power of the Fleet Corporation *to have been given to a single man,* we doubt if any one would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. *Osborn v. Bank of United States,* 9 Wheat. 738, *United States v. Lee,* 106 U. S. 196. The opposite notion left some traces in the law (1 Roll. Abr. 95, Action sur Case, T.), but for the most part long has disappeared."

In the *Matter of the Eastern Shore Ship Building Corporation, Bankrupt,* 274 Fed. 893, 48 Am. B. R. 110, ruled upon at the same time by the Supreme Court on certiorari, the United States Circuit Court of Appeals for the Second Circuit, said:

> "When the United States enters into commercial business, it abandons its sovereign capacity and is to be treated like any other corporation. Although it absolutely owns the Panama Railroad Company, and is the only person profiting or losing by its activities, still the roadroad company sues and is sued just like any other corporation, in its own name."

Elsewhere in the opinion we find the following significant statement:

"But surely the fact that the Fleet Corporation was employed as an agency of the President does not of itself clothe the agency so employed with the immunities of his office. A bank organized under the National Bank Act and employed by the Secretary of the Treasury under the act as a depositary of public money and, to use the language of the act, as 'a financial agent of the government' does not on that account lose its character as a private corporation, and does not become immune from suit."

In both cases the Court held that the Emergency Fleet Corporation's claims were not entitled to priority, notwithstanding the fact that the Emergency Fleet Corporation was admittedly an agency of the government.

In the *United States Bank v. Planters Bank of Georgia,* 9 Wheat. 904, 6 L. Ed. 244, the Supreme Court, speaking through Chief Justice Marshall, said:

"It is, we think, a sound principle that, when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself; and takes the character which belongs to its associates, and to the business which is to be transacted. . . . The state of Georgia, *by giving to the bank the capacity to sue and be sued,* voluntarily strips itself of

its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character."

As was pointed out by the Court in the *matter of the Eastern Shore Ship Building Corporation, Bankrupt, supra,* the government, in the case at bar was and is not engaged in any activities "peculiarly governmental in its nature," but is engaged in an activity which is, to use the words of the Court, "commercial and industrial." This activity is being carried out by an individual agent, namely: "the Federal Housing Administrator on behalf of the United States of America," as the title of this appeal indicates. According to the opinion of the Supreme Court in *Sloan Shipyards Corporation, et al. v. United States Shipping Board Emergency Fleet Corporation, et al.,* though the Federal Housing Administrator may be "an instrumentality of government for the greatest of ends, he is but an agent, does not cease to be answerable for his acts," and is not entitled to priority any more than any other private person.

We would also like to direct the Court's attention to the fact that in the *Sloan Shipyards* case, although there was a dissenting opinion by Chief Justice Taft, concurred in by Mr. Justice Van Devanter and Mr. Justice Clarke, regarding the necessity of bringing action against the Emergency Fleet Corporation in the Court of Claims, the dissenting justices were careful to qualify their dissent so as not to include the ques-

tion of priority. We quote the saving clause in the dissenting opinion:

> "As to the preference claimed against a bankrupt in No. 526 by the Fleet Corporation, I concur in the conclusion of the court that it cannot be allowed under the statute as to preferences in bankruptcy because I do not think it extends to claims of the United States *except those for taxes.*"

See, also, *United States v. Wood,* 290 Fed. 109, 1 Am. B. R. (N. S.) 44. Affirmed by the Supreme Court of the United States later in 263 U. S. 680.

Conclusion

In conclusion our contention is the U. S. did not acquire any greater rights than the Calif. Bank and Appellee feels that the question certified by the United States Circuit Court, Ninth Circuit, to this court should be answered in the negative, and that the claim of the United States of America be denied priority.

Respectfully submitted,

THOMAS S. TOBIN,
Attorney for Appellee.

CLARENCE HANSEN,
Of Counsel.

March, 1939.

Due service and receipt of a copy of the within is hereby admitted this_____ day of March, 1938.

_____

*Attorney for*_____

Supreme Court of the United States

No. 544.

THE UNITED STATES OF AMERICA,

vs.

EDWARD H. MARXEN, TRUSTEE OF MONTEREY BREWING COMPANY, A CORPORATION,

Bankrupt.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR TRUSTEE, *AMICUS CURIAE.*

HARRY LOEB MOSTOW,
Amicus Curiae.

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ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR TRUSTEE, *AMICUS CURIAE*.

Statement.

This brief is limited to a discussion of the question as to whether the Federal Housing Administrator is entitled to preferential treatment in the payment of claims filed by him in bankruptcy proceedings either by virtue of statutory enactment or sovereign prerogative.

This brief is submitted *amicus curiae* by the attorney for John F. Burke, the trustee in bankruptcy of Henry Miller, Bankrupt, which bankruptcy proceeding is pending in the District Court of the United States for the Southern District of New York.

In that case a similar claim was filed by the Federal Housing Administrator making the same claim to priority as is made in the case before this court. The trustee

objected and moved to have the claim denied priority and allowed as a general one.

The Referee over-ruled the trustee's objection and allowed the claim as a priority claim. On review by the District Court of the United States, the Honorable Robert P. Patterson reversed the Referee and denied the claim priority and allowed it as a general claim. Judge Patterson, in his opinion (reported 25 Fed. Sup. 336), said:

> "The referee held that a claim by the Federal Housing Administrator based on a promissory note made by the bankrupt and acquired by the Administrator after bankruptcy was entitled to priority over general claims. The trustee in bankruptcy asks a review of the ruling.
>
> At the time when the petition in bankruptcy was filed, August 1, 1936, the bankrupt was indebted to National City Bank in the amount of $1,477, the unpaid balance of a negotiable promissory note covering a loan made by the bank for housing improvement. The bank was insured against loss on notes of this character by the Federal Housing Administrator, to the extent permitted by the National Housing Act. Proof of claim was filed by the bank. Later the Administrator reimbursed the bank and on October 14, 1936, took an assignment of the note. The bank's claim having been withdrawn, the Administrator on February 20, 1937, filed proof of claim against the bankrupt estate, purporting to act in behalf of the United States and claiming priority over general creditors. The trustee in bankruptcy made objection to the priority, but the referee overruled his objection, holding that the claim was entitled to priority.
>
> The claimed priority is based on section 64 (b) (7) of the Bankruptcy Act (11 U. S. C. A., section 104

[b] [7]), giving priority to 'debts owing to any person who by the laws of the States or the United States is entitled to priority,' the word 'person' to include the United States itself, and on section 3466 of the Revised Statutes (31 U. S. C. A., section 131), to the effect that debts due the United States shall have priority in cases where the debtor is insolvent. A debt owing to the United States has priority under these statutes. *United States* v. *Kaplan*, 74 Fed. 2nd, 664 (C. C. A. 2). The referee made an analysis of the National Housing Act and came to the conclusion that a debt owing to the Federal Housing Administrator is a debt owing to the United States. The soundness of this conclusion may be passed. Even if it be sound, the claim held by the Administrator is not one entitled to priority.

The decisive fact in the case is that the bankrupt did not owe a debt to the Federal Housing Administrator at the time when the petition in bankruptcy was filed or at any earlier time. The claim in question was then a debt owing by him to National City Bank, a simple debt that did not rate priority under the Bankruptcy Act. The passing of the claim to the Federal Housing Administrator by assignment months after the petition in bankruptcy was filed did not promote it from the ranks to a position of leadership. The rights of creditors both against the bankrupt and among themselves are fixed as of the time when the petition is filed. See *White* v. *Stump*, 266 U. S. 310, 313. The substantive right of a creditor to share in a bankrupt estate to any extent depends on the status of his claim at the time when the petition in bankruptcy was filed. *Zavelo* v. *Reeves*, 227 U. S. 625; *Williams* v. *United States Fidelity & Guaranty Co.*, 236 U. S. 549. So too the right of a

creditor to priority over other creditors in the distribution of an estate depends on the situation existing when the petition was filed. *In re Winfield Mfg. Co.*, 140 Fed. 185 (D. C. Pa.). If the claim was one not entitled to priority at that time, a later event will not confer priority. *In re C. H. Earle, Inc.*, 2 Fed. Supp. 15 (D. C. N. Y.), affirmed 65 Fed. 2nd, 1013 (C. C. A. 2), certiorari denied 290 U. S. 674. See also *In re Gasteiger & Co.*, 25 Fed. 2nd, 642 (C. C. A. 2); *In re Photo Electrotype Co.*, 155 Fed. 684 (D. C. N. Y.); *In re Waverly Typewriter* (1898), 1 Ch. 699. Were the rule otherwise the United States or a state might buy up claims of mere general creditors after bankruptcy and collect in full, to the ruin of the other creditors. The assignment of the bankrupt's note by the bank to the Federal Housing Administrator after the petition in bankruptcy was filed did not disrupt the equality among creditors prevailing at the time of petition filed. The claim should not have been accorded priority.

Federal Housing Administrator v. *Moore*, 90 Fed. 2nd, 32 (C. C. A. 9), presented the same facts as thos in this case. Priority was denied. In *Wagner* v. *McDonald*, 96 Fed. 2nd, 273 (C. C. A. 8), relied on by the referee, the notes had been assigned to the Administrator prior to the maker's bankruptcy; the decision that the notes had a prior position because they were in effect held by the United States does not touch the present case. The order granting priority will be reversed and the claim allowed as a general one."

The Federal Housing Administrator appealed to the United States Circuit Court of Appeals for the Second Circuit from the order of Judge Patterson denying priority to the administrator's claim. On February 7th, 1939,

the United States Circuit Court of Appeals for the Second Circuit adjourned the hearing of the appeal pending the determination of the question certified in this case.

The questions as to whether the Federal Housing Administrator had a provable claim at the time of the filing of the petition and as to what rights the administrator acquired by virtue of his assignment from the bank, subsequent to the time of the filing of the petition in bankruptcy, are not touched upon in this brief except insofar as these matters are discussed in the opinion of Judge Patterson quoted on pages 2 to 4 of this brief.

POINT ONE.

The Federal Housing Administrator is not entitled to priority in the payment of claims filed by him in bankruptcy proceedings by virtue of the National Housing Act nor by sovereign prerogative.

The National Housing Act, Sections 1 to 6 (12 U. S. C. A., Sections 1702-1706) (set forth in the government's brief), which was enacted in June, 1934, indicates that the Federal Housing Administration was created to aid private business and not to perform any of the essential functions of government.

Section 1703 of the National Housing Act sets forth the purposes of the statute as follows:

> "(a) The Administrator is authorized and empowered, upon such terms and conditions as he may prescribe, to insure banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies, and other such financial institutions, which the Administrator finds to be qualified by experience or facilities

and approves as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them on and after April 1, 1936, and prior to April 1, 1937, * * *."

There is no sound distinction betwen the purposes of the National Housing Act, which created an agency called a Federal Housing Administration, to engage in private business and exercise all of the powers and functions of a body corporate, and the creation by the government of the Reconstruction Finance Corporation.

The purposes of the Reconstruction Finance Corporation are set forth in that Act (15 U. S. C. A., Section 605) as follows:

"To aid in financing agriculture, commerce, and industry, including facilitating the exportation of agricultural and other products, the Corporation is authorized and empowered to make loans, upon such terms and conditions not inconsistent with this chapter as it may determine, to any bank, savings bank, trust company, building and loan association, insurance company, mortgage-loan company, credit union, Federal land bank, joint-stock land bank, Federal intermediate credit bank, agricultural credit corporation, livestock credit corporation, organized under the laws of any State or of the United States, including loans secured by the assets of any bank, savings bank, or building and loan association that is closed, or in process of liquidation to aid in the reorganization or liquidation of such bank or building and loan associations, upon application of the receiver or liquidating agent of such bank or building and loan association, and any receiver of any national

bank is hereby authorized to contract for such loans and to pledge any assets of the bank for securing the same."

The National Housing Act, in effect, set up an entity separate and distinct from the government. Its functions were non-governmental.

The Reconstruction Finance Corporation obtained its funds from the Treasurer of the United States (15 U. S. C. A., Section 602):

> "The corporation shall have capital stock of $500,000,000, subscribed by the United States of America, payment for which shall be subject to call in whole or in part by the board of directors of the corporation."

By the National Housing Act the Reconstruction Finance Corporation was directed to supply the Federal Housing Administrator with funds (12 U. S. C. A., Sec. 1705):

> "For the purposes of carrying out the provisions of this title and titles II and III of this chapter, the Reconstruction Finance Corporation shall make available to the Administrator such funds as he may deem necessary, and the amount of notes, debentures, bonds, or other such obligations which the Corporation is authorized and empowered to have outstanding at any one time under existing law is hereby increased by an amount sufficient to provide such funds: * * *."

The purposes and functions of the Federal Housing Administration are analogous to the purposes and functions of the Reconstruction Finance Corporation. The difference is in name and scope only. Neither of the creating statutes grants priority treatment in bankruptcy proceedings.

This court held in *Continental Illinois Nat. Bank & Trust Co. of Chicago* v. *Chicago, R. I. & P. Ry. Co., et al.*, 294 U. S. 648 (1935), that the Reconstruction Finance Corporation was not entitled to preferential treatment in bankruptcy proceedings, in the absence of express language in the statute which created the Reconstruction Finance Corporation.

In *Continental Illinois Nat. Bank & Trust Co. of Chicago* v. *Chicago, R. I. & P. Ry Co., et al.*, 294 U. S. 648, 684, Mr. Justice Sutherland said:

> "The Reconstruction Finance Corporation Act creates a corporation and vests it with designated powers. Its entire stock is subscribed by the government, but it is none the less a corporation, limited by its charter and by the general law. The act does not give it greater rights as to the enforcement of its outstanding credits than are enjoyed by other persons or corporations in the event of proceedings under the Bankruptcy Act. The provisions and principles of enforcement of the Bankruptcy Act, including section 77, are binding upon the Reconstruction Finance Corporation, in the absence of some pertinent statutory exception, as they are upon other corporations. We are unable to find such an exception * * *. What is given to the lender in either event is a remedy which, when subject to the control of the bankruptcy court under given circumstances in the one case, is equally so in the other."

Nor can the Federal Housing Administrator claim priority by virtue of sovereign prerogative since the claim does not arise by virtue of a statute which seeks to raise revenue for the government.

In *Price* v. *United States*, 269 U. S. 492, 499 (1925), Mr. Justice Butler said:

> "The claim of the United States does not rest upon any sovereign prerogative; but the priority statutes were enacted to advance the same public policy which governs in the cases of royal prerogative; that is, to secure adequate public revenue to sustain the public burdens."

In *Davis* v. *Pringle*, 268 U. S. 315, 318 (1925), the late Mr. Justice Holmes said:

> "Public opinion as to the peculiar rights and preferences due to the sovereign has changed. We agree with the view of this point taken by the Chief Justice and Justices Van Devanter and Clarke in *United States Shipping Board Emergency Fleet Corporation* v. *Wood*, 258 U. S. 549, 574 * * *. The priority claimed by the United States is not given to it by the law."

In *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236 (1926), this court held that although the United States, in taking over and operating railroads, acted in sovereign capacity, rights of Director General of Railroads as to priority of claims arising out of operations rests on statutory provisions and not on sovereign prerogative. The Director General was not entitled to priority in insolvency proceedings under Rev. Stat. Sec. 3466. Mr. Justice McReynolds cited and relied on *Davis* v. *Pringle*, 268 U. S. 315, and *Price* v. *United States*, 269 U. S. 492, which cases rejected the principle of priority by virtue of sovereignty enunciated in the decisions of this court in *Lewis* v. *United States*, 92 U. S. 618 and *United States* v. *Fisher*, 2 Cranch. 618.

This court denied certiorari, 302 U. S. 687, in the case of *Home Owners' Loan Corporation* v. *Central Market, Inc.*, 132 Nebraska 380, wherein it was held that the

Home Owners' Loan Corporation was created to provide emergency relief to home owners in refinancing mortgages and that the Home Owners' Loan Corporation does not have powers of either executive, judicial or legislative branches of government. It was held that it is not entitled to immunity from civil process and is subject to the same liabilities as other corporations similarly employed.

The Federal Housing Administration is in the business of insuring credits, and without questioning its beneficent motive, it is, nevertheless, engaged in a private endeavor.

This court has held that when the United States enters into commercial business, it abandons its sovereign capacity and is to be treatd like any other corporation.

United States Shipping Board v. *Wood*, 258 U. S. 549.

The provisions of the statute indicate an intention to give to private business the benefits conferred without reservation of special rights against those whom the law seeks to assist.

It could not have been the intention of the United States to aid private business with one hand to the extent of one hundred million dollars and to take for itself with the other hand a priority in the payment of its claims in bankruptcy proceedings against private business.

Gillen vs. *Home Owners' Loan Corporation*, 255 App. Div. (N. Y.) 631.

By the original Act itself, the administrator could appoint and compensate assistants without regard to the provisions of other laws * * * delegate the powers and functions conferred upon him * * * make expenditures * * * as are necessary * * * without regard to any other provisions of law governing the expenditure of public

funds * * * could sue or be sued in his official capacity (Section 1702).

The amendments to the National Housing Act, enacted by Congress on April 17th, 1936 (12 U. S. C. A., Section 1703 [c] and [e]), uniformly indicated an intention to confer no special benefits upon the Federal Housing Administrator and excluded the administrator from the operation of other laws generally.

Section 1703 (c):

> "Notwithstanding any other provisions of law, the Administrator shall have the powers, * * * to collect or compromise all obligations assigned to or held by him * * *."

Section 1703 (e):

> "The Administrator is authorized to waive compliance with regulations * * * with respect to the interest and maturity of and the terms, conditions, and restrictions under which loans, * * * may be insured * * *."

CONCLUSION.

The question certified to this Court by the United States Circuit Court of Appeals for the Ninth Circuit should be answered in the negative.

Respectfully submitted,

HARRY LOEB MOSTOW,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 544.—October Term, 1938.

The United States of America. *vs.* Edward H. Marxen, Trustee of Monterey Brewing Company, A Corporation, Bankrupt.	On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[May 15, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

The case is here on certificate from the Circuit Court of Appeals for the Ninth Circuit with a request for instructions needed in a pending cause. Sec. 239, Jud. Code, 28 U. S. C. § 346. The following facts are stated: On August 10, 1934, the Federal Housing Administrator issued a policy of insurance, under the provisions of the National Housing Act, Title 1, Sec. 2,[1] to the California Bank, a banking corporation. On January 2, 1936, the California Bank, under the protection of this policy, made a loan to the Monterey Brewing Company. The company paid part of the indebtedness but defaulted on the balance on February 2, 1937. On April 5, 1937, it filed a petition in bankruptcy and was adjudicated a bankrupt. Under the insurance contract the bank had to wait until 60 days after default before making claim upon the Administrator. The 60 days expired two days before bankruptcy of the company. The bank, however, did not present its claim to the Administrator until July 3, 1937; the latter paid August 4, 1937; by draft drawn on the Treasury of the United States; the bank assigned the note to the "United States of America." Later the Administrator filed a claim upon the note in the name of the United States of America.

[1] "Sec. 2. The Administrator is authorized and empowered, upon such terms and conditions as he may prescribe, to insure banks . . . which are approved by him as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them . . . for the purpose of financing alterations, repairs, and improvements upon real property. In no case shall the insurance granted by the Administrator under this section to any such financial institution exceed 20 per centum of the total amount of the loans, advances of credit, and purchases made by such financial institution for such purpose . . ." Act of June 27, 1934, c. 847, 48 Stat. 1246.

The referee allowed it as a general claim only. The district court approved. *In re Monterey Brewing Co.*, 24 F. Supp. 463. On the appeal to the circuit court of appeals the following question, decisive of the controversy,[2] was certified:

"Where, prior to the filing of a petition for and adjudication in bankruptcy of the maker of a promissory note payable to a bank, the Federal Housing Administrator, under the provisions of the National Housing Act, insured the payee bank against the nonpayment of the note by its maker, upon which note the maker became in default more than sixty days prior to said filing and adjudication, and upon demand of the insured bank made after the adjudication, the Federal Housing Administrator paid to the bank its claim arising from such default, and procured an assignment to the United States of the claim of the insured bank against the bankrupt, which claim had not been presented or proved in bankruptcy by the insured bank, and presented such claim in the name of the United States to the trustee in bankruptcy having before him other allowed claims against the bankrupt, is such claim entitled to priority over such other claims under sec. 3466 of the Revised Statutes (31 U. S. C. A. § 191) by reason of the provisions of sec. 64(b)(7) [11 U. S. C. A. § 104(b)(7)]."

Section 64(b)(7) conferred priority upon "debts owing to any person who by the laws of . . . the United States is entitled to priority: *Provided,* that the term 'person' . . . shall include . . . the United States . . . ."[3] Section 3466 of the Revised Statutes, the basis for the claimed priority, provides that "Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied; and the priority hereby established shall extend . . . to cases in which an act of bankruptcy is committed."

Altnough an amendment of the National Housing Act authorized the Administrator to sue and be sued in any court of competent jurisdiction, State or Federal,[4] it is not necessary in answering the present certificate to determine whether by this addition the Congress intended to give the Administrator the status of a corporation or other entity distinct from the United States and by such status, to confer on or withhold from claims of the Federal Housing

[2] United States v. Mayer, 235 U. S. 55, 66; cf. Wheeler Lumber Co. v. United States, 281 U. S. 572, 577; Indian Motocycle Co. v. United States, 283 U. S. 570, 573.

[3] Act of May 27, 1926, c. 406, 44 Stat. 667; 11 U. S. C. § 104(b)(7). This section has been amended by the Act of June 22, 1938, c. 575, § 64, 52 Stat. 874.

[4] Act of August 23, 1935, c. 614, § 344(a), 49 Stat. 722.

Administration against bankrupts the advantages of section 3466.[5] We can deal only with a claim of the Federal Housing Administration assigned to the United States after the adjudication in bankruptcy of the obligor. It is assumed that such a claim belongs to and is made by the United States.[6]

Before considering the applicability of Section 3466 to claims of the United States acquired after the bankruptcy of the obligor, we must examine the contention of the Government that it possessed a provable claim at the time the petition in bankruptcy was filed. This assertion predicates an agreement, express or implied, by the obligor to indemnify the Government for any loss it may sustain by reason of its insurance of the bank. The question certified contains nothing as to the contract of insurance except that it was under the provisions of the National Housing Act and "insured the payee bank against the non-payment of the note by its maker." The section of that act, quoted above, does not indicate any privity between the bankrupt maker and the Government based upon the insurance contract. Even if we accept as accurate the statement in the certificate that the Administration insured against the non-payment of this note,[7] there is nothing in the record to connect the maker with the insurance. The Government attempts to fill in the facts lacking in the certification by printing in its brief a regulation of the Federal Housing Administration, Number 10 of July 15, 1935,[8] and the

[5] The purpose of the amendment was said to be "clarifying." Sen. Rep. No. 1007 on H. R. 7617, 74th Congress, 1st Session, p. 24. The House Report merely stated its substance. H. R. Rep. No. 1822 on H. R. 7617, 74th Congress, 1st Session, p. 57. The Congressional Record is silent on this clause of the Banking Act of 1935.

A corporation wholly owned by the United States is held without the advantages of § 3466. Sloan Shipyards *v.* U. S. Fleet Corporation, 258 U. S. 549, 570.

[6] Cf. Wagner *v.* McDonald, 96 F. (2d) 273, 274; In re Dickson's Estate, 84 P. (2d) 661, 664; DuPont de Nemours & Co. *v.* Davis, 264 U. S. 456; Clallam County *v.* United States, 263 U. S. 341; North Dakota-Montana Wheat Growers Ass'n *v.* United States, 66 F. (2d) 573, 576-577.

[7] This is not in accord with the practice under Title I of the National Housing Act. The act is administered so as to create an insurance reserve for each approved financial institution of not to exceed the authorized percentage of the total amount of qualified paper. Cf. Regulations, Federal Housing Administration, Property Improvement Loans, 3 Federal Register 358, regulation number 17.

[8] "The question of the financial condition of the borrower is left to the reasonable judgment of the insured institution as a credit matter. The borrower must furnish the lending institution a financial or credit statement, approved as to form by the Administrator, which in the judgment of the insured institution shows the borrower to be solvent, with reasonable ability to pay the obligation and in other respects a reasonable credit risk in view of the insurance provided by the National Housing Act."

form of credit statement from the note maker to the bank in use, presumably, at the time of the loan. The form contains this sentence, as well as information as to the applicant's employment or business, his income and the property to be improved: "The following information is given for the purpose of inducing you to grant credit under the provisions of Title I of the National Housing Act."

The regulation and the credit statement certainly do not supply the facts necessary to the conclusion that this particular form of credit statement was used. As the certificate does not show the State in which the note was executed, payable or enforceable, we are left to speculate as to the applicable law of indemnity. It is not clear that a voluntary guarantor can recover in every jurisdiction from the involuntary principal who has not requested the service.[9] But even if we assume that such a guarantor may recover upon an implied promise of reimbursement, the rule is not effective here. The statement of the case and the question certified show that the claim in bankruptcy of the Government is based upon the note, duly assigned to it after bankruptcy. As no proof was made of any claim for reimbursement, such a claim is not involved.[10]

The claim on the note, assigned to the United States subsequently to the maker's bankruptcy, has priority, if at all, by virtue of the general provisions of Section 3466, as recognized by Section 64(b)(7) of the Bankruptcy Act.[11] That subdivision granted priority ahead of dividends to creditors, to claims entitled to priority under the laws of the United States. Priority has been secured to the United States in varying language throughout its history.[12] The tendency has been to interpret these provisions

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[9] Cf. Leslie *v.* Compton, 103 Kan. 92; Marsh *v.* Hayford, 30 Me. 97; McPherson *v.* Meek, 30 Mo. 345.

[10] Cf. Insley *v.* Garside, 121 F. 699, 702. Cf. also Sec. 57(i) which provides that "Whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." Act of July 1, 1898, c. 541, § 57, 30 Stat. 560, 11 U. S. C. § 93.

[11] See note 3, *supra.*

[12] The Government summarizes the legislative background as follows: "The Act of July 31, 1789, Sec. 21, c. 5, 1 Stat. 29, 42, first gave the United States priority but was limited to debts due on bonds for duties. The Act of May 2, 1792, Sec. 18, c. 27, 1 Stat. 259, 263, allowed sureties who paid their debts to the United States to exercise their priority. The Act of March 3, 1797, Sec. 5, c. 20, 1 Stat. 512, 515, extended the priority to all debts due from any person. The Act of March 2, 1799, Sec. 65, c. 22, 1 Stat. 627, 676, applied to bonds for duties. R. S., Sec. 3466 is derived from the Acts of 1797 and 1799."

liberally to secure the advantage sought by the Congress.[13] "As this statute has reference to the public good it ought to be liberally construed."[14] It has been said that "nothing else appearing" even claims under the railroad Federal Control Act would be entitled to priority.[15] But this principle of construction is subject to the limitation that the generality of the language of the section is restricted by the purpose to grant priority to the United States, only, and by legislative intention, as shown by other statutes. Consequently priority was refused to corporations wholly owned by the United States[16] and to the Director General of Railroads because section 10 of the Federal Control Act manifested an intention that the carriers under federal control should be treated as before their transfer to federal operation.[17] The United States itself when it sought priority for its loans under the Transportation Act was denied the benefits of Section 3466 because the intention to build up the credit standing of the railroads was inconsistent with the claimed priority.[18]

We are of the view that Section 3466 is inapplicable to general claims in bankruptcy transferred to the United States, or to which it has become subrogated on payment, after the filing of the petition for the reason that the rights of creditors are fixed by the Bankruptcy Act as of the filing of the petition in bankruptcy. This is true both as to the bankrupt and among themselves.[19] The assets

[13] United States *v.* Fisher, 2 Cranch 358; Harrison *v.* Sterry, 5 Cranch 289, 298-299; United States *v.* State Bank of North Carolina, 6 Pet. 29, 35; Beaston *v.* Farmers' Bank, 12 Pet. 102, 134; Lewis, Trustee *v.* United States, 92 U. S. 618, 621; Bramwell *v.* United States Fidelity & Guaranty Co., 269 U. S. 483, 487; Price *v.* United States, 269 U. S. 492, 500.

[14] Beaston *v.* Farmers' Bank, *supra*.

[15] Mellon *v.* Michigan Trust Co., 271 U. S. 236, 239.

[16] Sloan Shipyards *v.* U. S. Fleet Corporation, 258 U. S. 549, 570. Even though private parties might have participated in stock ownership under the law. See p. 565.

[17] Mellon *v.* Michigan Trust Co., *supra*, 240.

[18] United States *v.* Guaranty Trust Co., 280 U. S. 478, 485-86.

[19] White *v.* Stump, 266 U. S. 310, 313; In re C. H. Earle, Inc., 2 F. Supp. 15, affirmed on the opinion below 65 F. (2d) 1013. Cf. Spokane County *v.* United States, 279 U. S. 80, 93; United States *v.* Oklahoma, 261 U. S. 253, 260, as to receivership proceedings.

The lower courts have divided upon the issue whether a Federal Housing Administration claim is entitled to priority. Priority has been given in Wagner *v.* McDonald, 96 F. (2d) 273; In re Wilson, 23 F. Supp. 236; In re T. N. Wilson, Inc., 24 F. Supp. 651; cf. In re Dickson's Estate, 84 P. 2d 661. Priority has been denied in In re Hansen Bakeries, Inc., C. C. A. 3, Jan. 27, 1939 (unreported); Federal Housing Administrator *v.* Moore, 90 F.

at that time are segregated for the benefit of creditors.[20] The transfer of the assets to someone for application to "the debts of the insolvent, as the rights and priorities of creditors may be made to appear,"[21] takes place as of that time.

The question certified should therefore be answered in the negative.

It is so ordered.

The Chief Justice and Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

(2d) 32; In re Stamford Auto Supply Co., 25 F. Supp. 530; In re Miller, 25 F. Supp. 336; cf. Paul v. Paul Lighting Fixture Co., 13 Oh. L. Rep. 27. The assignment was made prior to bankruptcy or insolvency in the Wagner and Dickson cases. In the Wilson and T. N. Wilson, Inc., cases the time of assignment is uncertain. In the remaining cases it came after bankruptcy or insolvency.

[20] Mueller v. Nugent, 184 U. S. 1, 14; May v. Henderson, 268 U. S. 111, 117.

[21] Bramwell v. United States Fidelity & Guaranty Co., 269 U. S. 483, 490.